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Supreme Court of the United States

ARDEN MAYS MERCKLE,

Petitioner,

vs.

JACK R. HARPER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Arden Mays Merckle petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra.*) is reported at 638 F2d 848.

JURISDICTION

The judgment of the court of appeals (App. B, *infra.*) was entered on March 5, 1981. A petition for rehearing was timely filed on March 13, 1981 and was denied on April 7, 1981. (App. C, *infra.*). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a state trial court judge is absolutely immune from civil liability in a 42 U.S.C. § 1983 proceeding for his act of improperly holding a person in contempt.

STATUTES INVOLVED

Section 1983 of 42 U.S.C., Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE[1]

A. Background

In 1970, plaintiff Jack R. Harper and Patricia F. Harper were divorced by order of the Circuit Court of the Tenth Judicial Circuit, Polk County, Florida. Effective July 2, 1974, that court officially closed its file in the divorce case and ordered Harper to tender future support payments directly to his former wife. Harper, who had remarried and who resided in Boca Grande, Florida, travelled to Tampa on August 16, 1974 with his second wife to attend to various family matters. On that day, Harper went to the Hillsborough County Courthouse to leave a support payment check with his former wife, Patricia, a

1 Judge Merckle's statement of the case is taken entirely and almost verbatim from the face of the opinion of the circuit court [638 F2d at 850-859].

secretary employed by Judge Harry Coe of the Florida Circuit Court. Finding both doors to Judge Coe's chambers closed, Harper entered an adjacent office where Barbara Bryant, secretary to defendant Judge Merckle, was seated behind a desk. Harper asked Miss Bryant whether she knew Mrs. Harper and where Mrs. Harper could be found. Miss Bryant responded that although Mrs. Harper has left work it might be possible to locate her. After Miss Bryant made several unsuccessful attempts to reach Mrs. Harper by phone, Harper explained the purpose of his visit, namely, to make a child support payment to his former wife. Knowing that she would see Mrs. Harper in the course of the weekend, Miss Bryant offered to deliver a check to Mrs. Harper on Harper's behalf. Although Harper was not certain exactly how much he owed his former wife, he approximated, wrote a check for $210.00, and gave it to Miss Bryant.

During most of this conversation Judge Merckle sat in his office. But during Harper's explanation of his debt, Judge Merckle—wearing street clothes, not judicial attire—entered the room, told Miss Bryant to retrieve the "Harper v Harper" file from the Clerk's office, and as she left sat down in the seat his secretary had occupied. In sending for the file, Judge Merckle was attempting to verify what he later recognized was a mistaken impression—ostensibly gleaned through courthouse gossip or his casual acquaintance with Harper's former wife—that the file contained an outstanding contempt violation against Harper.

Judge Merckle then engaged Harper in small talk, which lasted until Miss Bryant called to say she could not locate the file. Judge Merckle told Miss Bryant to return to the office, ended the phone conversation, and turned his attention to the check Harper had written for child support. As he examined it, Judge Merckle asked Harper where he lived. Harper directed Judge Merckle's attention to the address on the check and said he lived in Boca Grande, Florida. When Judge Merckle ob-

served that the "address" on the check indicated only a post office box number, Harper explained that there are no street addresses or numbers in Boca Grande and that mail there is delivered only to a post office. Judge Merckle then asked Harper exactly where he lived; Harper was responsive, giving the name of his apartment complex, the number of his apartment, and a business card that contained address information identical to that on the check. Then, Judge Merckle, still seated behind his secretary's desk, told Harper to raise his right hand to be sworn in.

The subsequent occurrences are the subject of some factual dispute. Harper testified that he promptly walked out of the office into the hall passing Miss Bryant, who was returning from the Clerk's office. Judge Merckle, again according to Harper's testimony, pursued him into the hall, told Miss Bryant to locate a deputy, and attempted to grab hold of Harper. Harper told the judge "Don't you dare touch me" and Judge Merckle did not. As Judge Merckle and his secretary looked for a deputy, Harper exited the building and attempted to find the nearby law office of a friend.

Judge Merckle's testimony paints Harper as far more belligerent. Judge Merckle claimed that after he told Harper to raise his hand, Harper responded, "No mother f _ _ _ _ _ is going to swear me in" and bolted from the office.

A chase scene ensued. Harper, whether he walked or ran from the courthouse, soon found he was being pursued by court bailiffs. He ducked into an office building in search of his attorney friend and proceeded to the second floor, only to be informed that his friend had relocated his office two weeks earlier. Harper then headed for the back stairs of the building, where he was trapped by the bailiffs. Harper was then escorted to the front of the building by the bailiffs where he called out to bystanders, "Please, please, remember what's gong (sic) on."

There, Harper testified, he was thrown against a fence and frisked in full view of the public. The bailiffs then took Harper to Judge Merckle's office, there 10 or 15 people—besides Judge Merckle and a court reporter—awaited his arrival.

B. The Hearing

At this point, in chambers, Judge Merckle began a "contempt proceeding". The record of that "hearing" in which Judge Merckle acted as complaining witness, prosecutor, factfinder, and judge, follows in its entirety.

IN THE COUNTY COURT
IN AND FOR HILLSBOROUGH COUNTY
In Re: No. 10747

Jack Harper—Contempt of Court: Div. "A"

THE COURT: Let's go on the record. I would like to cite the facts.

MR. HARPER: I haven't been informed of my rights and I want an attorney. That's all I want.

THE COURT: Mr. Harper, just remain quite just for a few minutes, please sir.

All right, this is Friday, August 16, 1974. Mr. Harper came in my Chambers approximately, I'd say, three o'clock in the afternoon looking for Mrs. Pattie Harper or Judge Coe.

The purpose of coming in trying to find these two individuals was for Mr. Harper to pay some back child support I gather that he owed Mrs. Harper.

I tried to find Mr. Peaveyhouse, Mrs. Harper's attorney, to

no avail. I also tried to check out the court file to assist Mr. Harper to find out what the delinquent child support was. Could not find the court file.

Because of not being able to find this, I told Mr. Harper the best thing to do would be just go ahead and leave the check, if he wanted to.

I did not know if this was the correct amount or not, but this is his own choosing and he wrote out the check and left a check for $210 made payable to Mrs. Pattie Harper, dated August 16.

I also asked Mr. Harper what his address was in Boca Grande, as I understood that there are various summons outstanding, trying to get him served for his contempt proceedings in the Circuit Court for failure to pay child support.

MR. HARPER: Which Circuit Court?

THE COURT: Just a minute, Mr. Harper, please, sir.

MR. HARPER: I haven't received anything from any court other than I was supposed to make my payments.

THE COURT: Mr. Harper, just remain quiet.

MR. HARPER: From Polk County directly to Pattie Harper.

THE BAILIFF: Do you understand what the Judge is saying?

THE COURT: Mr. Harper, please remain quiet.

MR. HARPER: I can't say anything?

THE COURT: In a few minutes.

I asked Mr. Harper his address and I thought it might be better to put him under oath to find out where he did reside, so justice could be done.

He stated to me he wasn't about to be sworn, he wasn't there to tell me anything.

MR. HARPER: I didn't say that—anything—

THE COURT: And if anyone proceeded to hurt him or try to take him into custody, which I told him I might have to do, he said that they are going to have to do it in force. And he got up—

MR. HARPER: I did not say any force, either.

THE BAILIFF: Mr. Harper, please be quite.

THE COURT: He got up and proceeded out. I told him to remain seated. He said he wasn't about to.

I sent my secretary for the Sheriff's Deputies and, as I understand it, from then on, that they had to give chase and in approximately fifteen or twenty minutes he has been brought back into my office.

MR. HARPER: Would you tell him exactly how you chased me?

THE COURT: Just a minute, Mr. Harper.

The whole basis of this hearing is whether or not you are in contempt of this Court for not remaining where you were.

The Court at this time does hold you in contempt so anything you care to say Mr. Harper, before the Court imposes any sentence on you:

All right sir.

MR. HARPER: Well, I said—I was sitting there. You said you wanted me to raise my hand. I said "Why"? You said because you wanted to put me under oath. Exactly what you said. I said, "Why"? You said because you wanted to check my address.

You want to check my address, read my address. And then call Boca Grande. Boca Grande is only a city of two hundred, three hundred. You walk on the island, say, "Where is Jack Harper?" they are going to direct you to Jack Harper.

I am not trying to hide anything. I am in the real estate business down there. I am a registered real estate broker. I have a fishing business. I have a business in Lakeland. And I don't think it's too good, me to be roughed up, treated like I have been treated, after I make an effort, an effort to pay my ex-wife what she deservingly owes, as the good Court granted her.

If you would like to read back what he said to me, I would be glad to object to what he said, if you listen, because they are not exactly—you assumed words. You haven't said exactly right, exactly what has happened.

THE COURT: Well, Mr. Harper, like I have stated, the Court has found you in contempt of court.

MR. HARPER: For what?

THE COURT: Mr. Harper, at this time, I am not going—

MR. HARPER: How can I be in contempt of court when I have paid my dues?

THE COURT: Just be quiet, please, sir.

MR. HARPER: I tell you, man, this is really crazy.

THE COURT: What I am going to do, sir, before the Court imposes sentence—in fact, I am not going to impose any sentence at this time.

Mr. Harper, can you be here Monday morning at nine o'clock?

MR. HARPER: No, I will be out of town.

THE COURT: All right, sir, then, I will put you in custody. You will be here. All right, sir.

MR. HARPER: For what?

THE COURT: Be back in this court—

THE BAILIFF: Contempt of Court.

THE COURT: Have him back in this court at that time, Monday morning at nine o'clock.

MR. HARPER: I will be here—wait a minute—wait a minute—wait a minute.

Now, why is all this happening?

THE COURT: Because you disobeyed a Court rule.

MR. HARPER: Where was the Court?

THE COURT: Just take him out, Mr. Pinegar.

MR. HARPER: Where is the Court: I want an attorney man.

(Hearing concluded at 3:50 p.m.)

Following the "hearing," Harper was placed in a small room to await transportation to jail. He testified that he was threatened during the wait by a man who raised a fist at him but did not strike him. Harper was allowed to call his wife. He informed her of his predicament and asked that she contact an attorney. Fifteen minutes later Harper was placed in a paddy wagon and transported to the county jail, where he was to spend his weekend. At the jail, Harper was fingerprinted. His personal effects were inventoried. He was photographed and put into a 6 x 8 foot hot, noisy, jail cell equipped with a small, dim twenty-four hour light, a lavatory and a urinal. Conditions were, as Harper testified, squalid:

> They gave me about an inch thick foam-rubber pad to put on a piece of metal there in the jail so I could sleep on, but it smelled so bad that there's no way that I could possibly have laid on it.
>
> I in turn cut my pants off because it was so hot, and made shorts, and I must have killed several hundred roaches while I was in there. It was just, it was—the smell, it smelled with vomit and human waste in the cell....

Harper further testified that his life was threatened, though he was not physically molested, by a prisoner peeved that Harper had no cigarettes. Efforts by Harper's attorney, directed to Judge Merckle, to obtain Harper's early release on bail were absolutely fruitless.

On Monday morning, Harper was chained to about a dozen prisoners and loaded into a van. He was then paraded in

shackles past his former wife, through the very hall where the incident occurred, and toward the courtroom. Soon he was brought before Judge Merckle, who postponed sentencing one week to accommodate Harper's attorneys and released Harper from custody. The following Monday Harper returned to Judge Merckle's courtroom and was sentenced to three days' incarceration with credit for time already spent in jail. He was, at that time, also served with a summons for a domestic relations hearing on the amount of his child support payments. Harper's contempt conviction ultimately was reversed by a Florida state court on appeal.

C. Procedural History

Harper filed his complaint on August 8, 1975 alleging with factual particularity a cause of action against Judge Merckle arising under 42 U.S.C. § 1983 (1976) for violation of Harper's constitutional rights. Merckle's motion to dismiss based upon his alleged immunity from suit was denied on April 26, 1977. On March 26, 1979 the case went to trial, which culminated in a jury verdict on special interrogatories for Judge Merckle. The trial court entered judgment on the verdict and subsequently denied Harper's Fed.R.Civ.P. 59 motion for new trial. Harper noticed timely appeal from the entry of judgment and the denial of new trial. On appeal, the circuit court reversed specifically holding in pertinent part that Judge Merckle should not be accorded absolute judicial immunity because his acts were not judicial acts. The circuit court then found it unnecessary to determine whether Merckle acted in complete absence of jurisdiction.

D. Special Interrogatories

During trial of this § 1983 action, Judge Merckle twice moved for directed verdict. The district court denied the first motion, made at the close of plaintiff's evidence, but withheld

its ruling on the renewed motion, determining that the proper course was to submit special interrogatories[2] to the jury. The purpose of interrogatories 1-3, according to the district court, was "informational" interrogatories 4-7 were intended to determine whether plaintiff established a prima facie case. Merckle's defenses were embodied in interrogatories 8-9, and Harper's damages were covered in interrogatories 10-11. Through special interrogatory #1, the jury specifically found that Harper used profane language in addressing Judge Merckle when Merckle attempted to put Harper under oath.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction in the United States District Court was premised upon 28 U.S.C. § 1343 (1976).

REASONS FOR GRANTING THE WRIT

In *Stump v Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.ed.2d 331 (1978), this court set out the standard against which to measure an "absolute judicial immunity" defense in a 42 U.S.C. § 1983 proceeding. The decision of the court of appeals in *Harper*, supra. misapplied the Stump test and misinterpreted the Stump decision. The result is that the Harper decision generates considerable ambiguity surrounding the definition of a judicial act. If, as the Harper court has determined, the act of holding a person in contempt is not a judicial act, then few state judges will be able to predict with any degree of certainty what is and what is not a judicial act.

The relationship between a state court's contempt power and the doctrine of absolute judicial immunity presents an important question which should be settled by this court. In the

2 See App. D, *infra*. for the special interrogatories and answers. These special interrogatories were specifically incorporated in n.6 to the opinion of the circuit court.

interests of comity and to eliminate the conflict between the *Stump*, supra., and *Harper*, supra. decisions, this court should clearly inform state court judges of the boundary beyond which they may not go in a contempt proceeding without becoming personally liable for erroneous acts.

The doctrine of judicial immunity is no stranger to this court. A relatively consistent approach to the problem can be traced from *Bradley v Fisher*, 13 Wall 335, 20 L.ed. 646 (1872) through *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.ed.2d 288 (1967) to the Stump decision.[3] The policy reasons militating for such a defense and the carefully balanced equities which support the defense have been explored by this court as recently as *Dennis v Sparks*, ____U.S.____, 101 S.Ct. 183, 188 (1980) and *Ferri v Ackerman*, 444 U.S. 193, 100 S.Ct. 402; 490, n.20 (1979). The clear and authoritative guidance of the pertinent decisions of this court should not be diminished by permitting decisions such as *Harper*, supra., to prevail in the Fifth Circuit.

The Fifth Circuit's misinterpretation and misapplication of the Stump decision is readily visible from a review of the fact of the Harper decision. In *Stump*, supra., 435 U.S. at 359-364; 98 S.Ct. n. 1106-08, this court determined that absolute judicial immunity extended to all judicial acts performed within a judge's jurisdiction. Thus, under the Stump decision, a two prong test was isolated. First, it must be determined whether the judge had jurisdiction to hold the proceeding. Second, it must be determined whether the act committed by the judge was a judicial one.

After recognizing that the Stump decision mandates a broad construction of the term jurisdiction, the Harper court found it unnecessary to determine whether Judge Merckle had jurisdiction under the first prong of the Stump test. *Harper*,

3 The Bradley decision withdrew the qualifying language on the judicial immunity defense contained in *Randell v Brigham*, 7 Wall 523 (1868).

supra. at 858 n.16. The determination was unnecessary because the Harper court found that the act of holding Harper in contempt was not a judicial act. *Harper*, supra. at 859. Of course, since Florida county court judges, such as Merckle, have contempt jurisdiction by operation of Fla. Statute § 38.22 (1973), it is apparent that Judge Merckle had sufficient jurisdiction to satisfy the first prong of the Stump test.

The Fifth Circuit's error in this case revolves around its application of the second prong of the Stump test. As previously stated, the Harper court specifically determined that Judge Merckle's act of holding Harper in contempt was not a judicial one. *Harper*, supra. at 859. In *Stump*, supra., at 435 U.S. 360, 98 S.Ct. 1107, judicial acts were isolated; 1) by looking to the nature of the act itself, i.e.: whether it was an act normally performed by a judge, and 2) by looking to the expectations of the parties, i.e.: whether the parties dealt with the judge in his judicial capacity. Furthermore, in *Stump*, supra., at 435 U.S. 356 98 S.Ct., 1104-05, this court determined that the immunity issue should be viewed from the point in time when the court took the challenged action.

In applying the second prong of the Stump test, the Harper court acknowledged that the act of holding Harper in contempt was one normally performed by a Judge. *Harper*, supra. at 858. However, the Harper court erroneously determined that Harper did not expect that judicial matters were at hand, i.e.: that Harper did not deal with Judge Merckle in a judicial capacity. The Harper court reached this determination by focusing on the wrong point in time. Specifically, the Harper court determined:

> "We think it clearly unreasonable to conclude that Harper entertained the expectation that judicial matters were at hand when he entered Judge Merckle's office on nonjudicial business." *Harper*, supra., at 859.

What Harper's expectations were when he entered Merckle's

office are not relevant to the Stump judicial act test. At that point in time, Harper was not restrained and hence suffered no constitutional deprivation. Harper suffered no arguable constitutional deprivation until *after* Merckle attempted to swear him in and *after* Harper cursed Judge Merckle.[4]

Had the Harper court focused on the point in time when the challenged action took place, it would have been completely reasonable to conclude that Harper expected that judicial matters were at hand. Before the challenged action, Harper was in a Judge's office. Before the challenged action, Judge Merckle sent his secretary for the Harper v Harper file.[5] Before the challenged action, Judge Merckle attempted to place Harper under oath. Under these circumstances a reasonable man would expect that judicial matters were at hand. In fact, when Harper left Merckle's office, he was heading for his lawyer's office. Clearly, on these facts, the Fifth Circuit was incorrect when it determined that the Stump judicial act test was not met.

Judge Merckle respectfully submits that the problems generated by the Harper decision are due in part to the language used in *Stump*, supra. In determining whether a judicial act was present in *Stump*, supra, 435 U.S. 362, 98 S.Ct. 1107, the court reviewed two factors and suggested that both were necessary. Merckle suggests that if the challenged act is one normally performed by a judge, then the judicial act inquiry should go no further. It is only where the act is not normally performed by a judge, that the expectations of the parties should become material. To this extent, Judge Merckle requests that this court revisit the Stump decision and put to rest the suggestion that two factors must be present under the judicial act test.

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4 It must be remembered that under special interrogatory #1, the jury specifically found that Harper cursed Merckle when Merckle attempted to put Harper under oath. [See App. D].

5 Admittedly, the Judge later learned that this file was in another court.

CONCLUSION

Based upon the foregoing arguments and authorities, Judge Merckle respectfully submits that he was absolutely immune from civil liability in a 42 U.S.C. § 1983 proceeding. Consequently, Judge Merckle requests that this writ of certiorari be granted and that the erroneous decision of the court of appeals be set aside.

Respectfully submitted

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Appendix A

JACK R. HARPER,
Plaintiff-Appellant,

v.

ARDEN MAYS MERCKLE,
Defendant-Appellee.

No. 79-2335

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT
UNIT B**

March 5, 1981

Civil Rights Act suit was brought against county judge. The United States District Court for the Middle District of Florida, George C. Young, Chief Judge, entered judgment on jury verdict for defendant, and plaintiff appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) judge did not enjoy absolute immunity since, under the circumstances, his conducting contempt proceedings against plaintiff and ordering him incarcerated were not "judicial acts"; (2) "illegality" was required to be proved as part of plaintiff's prima facie case of false imprisonment; (3) illegality was clear since the judge, claiming that he was acting as conservator of peace when he jailed plaintiff, did more in that he acted as complaining witness, arresting officer, finder of fact and judge, all without regard for the Fourteenth Amendment or state constitution; (4) only qualified immunity attached to actions taken as "conservator of the peace" as regards nonjudicial acts; and (5) there was reversible error in interrogatories.

Reversed and remanded for new trial.

1. Federal Courts 617

Where defendant county judge raised affirmative defense of absolute judicial immunity in his answer but did not press the point at trial, reviewing court would consider the immunity question. 42 U.S.C.A. § 1983.

2. Judges 36

A judge who acts after he is approached qua judge by parties to a case is immune from liability under Civil Rights Act of 1871, and even a judge who is approached as a judge by a party for purpose of conspiring to violate the Act is immune from a damage suit. 42 U.S.C.A. § 1983.

3. Judges 36

Although ensuring independence of the judiciary is a crucial policy basis supporting judicial immunity from liability and damages under Civil Rights Act of 1871, others include the need to avoid vexatious litigation against judges and the need for an end to litigation. 42 U.S.C.A. § 1983.

4. Judges 36

Judicial immunity from liability and damages under Civil Rights Act extends to all "judicial acts" unless those acts fall clearly outside the judge's subject-matter jurisdiction, with a broad construction given the term "jurisdiction" and immunity being lost only for acts in clear absence of all jurisdiction as opposed to acts merely in excess of jurisdiction. 42 U.S.C.A. § 1983.

5. Judges 36

Although county judge's asking plaintiff to raise his right hand to be sworn in and subsequently finding plaintiff in contempt occurred in judge's chambers, judge's ordering plaintiff apprehended, holding contempt proceeding and ordering plaintiff incarcerated were not "judicial acts" for purpose of Civil Rights Act immunity since controversy that led to incarceration did not center around any matter pending before the judge but around domestic problems of plaintiff's former wife, who worked in courthouse and who plaintiff was attempting to locate and problems, including judge's apparently mistaken belief that divorce filed contained outstanding contempt violation, were brought to judge's attention in a social forum and plaintiff did not visit the judge in his official capacity. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

6. Judges 36

When it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose, the judge's actions do not amount to "judicial acts," and such nonjudicial acts are not cloaked with judicial immunity from suit under Civil Rights Act of 1971. 42 U.S.C.A. § 1983.

7. Civil Rights 13.5(1)

A constitutional tort has both constitutional and tortious dimensions and when action is brought under Civil Rights Act of 1871, the plaintiff must also show a deprivation of a constitutional right, i.e., an illegality, under color of state law. 42 U.S.C.A. § 1983.

8. Civil Rights 13.13(1)

Illegality was required to be proved as part of prima facie case in action brought under Civil Rights Act of 1871 based on alleged false imprisonment by county judge. 42 U.S.C.A. § 1983.

9. Civil Rights 13.5(3)

For purpose of claim under Civil Rights Act of 1871 based on alleged false imprisonment by defendant county judge, the judge's acts were "illegal" in that although under state law the judge, who claimed to be acting as a "conservator of the peace," had power to arrest and to commit pending trial, the judge did more, in that he acted as complaining witness, and "arresting officer," although plaintiff was not formally arrested, as well as finder of fact and judge, all without benefit of counsel, and all of which actions were taken without regard of Fourteenth Amendment or state constitutional requirements, such as bail as

of right. 42 U.S.C.A. § 1983; West's F.S.A. Const. Art. 1, § 14; Art. 5, § 19; West's F.S.A. § 901.01; U.S.C.A.Const. Amend. 14.

10. Judges 36

Although county judge's actions including conducting contempt proceedings against plaintiff and ordering his incarceration were "illegal" for purpose of claim under Civil Rights Act based on false imprisonment, such illegality had no effect on whether judge was judicially immune from liability for damages. 42 U.S.C.A. § 1983.

11. Federal Civil Procedure 2233

It was error, in Civil Rights Suit based on alleged false imprisonment by county judge to submit interrogatory addressing plaintiff's awareness of his confinement and his resulting "damages" were nowhere did defendant assert that plaintiff was "unaware" of his confinement and term "harm" should have been used instead of "damages," notwithstanding that jury was instructed to weigh plaintiff's own conduct and prior actions in determining damages as the issue of damages, entirely separate from question of "harm" was covered expressly by subsequent interrogatories which, per the court's instructions, the jury never reached. 42 U.S.C.A. § 1983.

12. Judges 36

Florida county judge, who allegedly was acting as conservator of the peace in detaining plaintiff, finding him in contempt and ordering his incarceration, was entitled to qualified immunity as regards such nonjudicial acts and would be immune from damages liability under Civil Rights Act unless he knew or reasonably should have known that the action he took would violate plaintiff's constitutional rights or if he took the action with malicious intention to cause a deprivation of such rights, i. e., whether there was good faith and probable cause. 42 U.S.C.A. § 1983; West's F.S.A.Const. Art. 1, § 14; Art. 5, § 19; West's F.S.A. § 901.01; U.S.C.A.Const. Amend. 14.

13. Federal Courts 943

If, on retrial, defendant Florida county judge, charged with violating plaintiff's civil rights in restraining him, conducting contempt proceedings against him and ordering him incarcerated, asserted defense of qualified immunity based on non-judicial acts such as conservator of the peace, jury was to be charged with regard to statute dealing with bail and first appearance procedures as germane to question of good faith in is "objective" sense. 42 U.S.C.A. § 1983; 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.130(a, b).

Ted R. Manry, III, Charlie Luckie, Jr., Tampa, Fla., for plaintiff-appellant.

Barry A. Cohen, Richard G. Pippinger, John R. Parkhill, Tampa, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL, KRAVITCH and HATCHETT, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Plaintiff Jack R. Harper instituted this civil rights action against Judge Arden Mays Merckle, who was at the time of the alleged violations, a county judge in Hillsborough County, Florida. The case raises vexing problems concerning the scope of judicial immunity from suit under 42 U.S.C. § 1983 (1976). Holding that defendant is not entitled to assert absolute judicial immunity under the unusual facts of this case, and finding errors of law in the special interrogatories that the district court submitted to the jury, we reverse the judgment and remand the case for new trial.

I. *Facts and Procedural History*

A. *Background*

In 1970, plaintiff Jack R. Harper and Patricia F. Harper were divorced by order of the Circuit Court of the Tenth Judicial Circuit, Polk County, Florida. Effective July 2, 1974, that court officially closed its file in the divorce case and ordered plaintiff to tender future support payments directly to his former wife. Plaintiff, who had remarried and who resided in Boca Grande, Florida, travelled to Tampa on August 16, 1974 with his second wife to attend to various family matters. On that day, plaintiff went to the Hillsborough County Courthouse to leave a support payment check with his former wife, Patricia, a secretary employed by Judge Harry Coe of the Florida Circuit Court. Finding both doors to Judge Coe's chambers closed, plaintiff Harper entered an adjacent office where Barbara Bryant, secretary to defendant Judge Merckle, was seated behind a desk. Harper asked Miss Bryant whether she knew Mrs. Harper and where Mrs. Harper could be found. Miss Bryant responded that although Mrs. Harper has left work it might be possible to locate her. After Miss Bryant made several unsuccessful attempts to reach Mrs. Harper by phone, plaintiff explained the purpose of his visit, namely, to make a child support payment to his former wife. Knowing that she would see Mrs. Harper in the course of the weekend, Miss Bryant offered to deliver a check to Mrs. Harper on plaintiff's behalf. Although plaintiff was not certain exactly how much he owed his former wife, he approximated, wrote a check for $210.00, and gave it to Miss Bryant.

During most of this conversation Judge Merckle sat in his office. But during Harper's explanation of his debt, defendant—wearing street clothes, not judicial attire—entered the room, told Miss Bryant to retrieve the "Harper v. Harper" file from the Clerk's office, and as she left sat down in the seat his secretary had occupied. In sending for the file, Judge Merckle was attempting to verify what he later recognized was a mistaken impression—ostensibly gleaned through courthouse gossip or his casual acquaintance with plaintiff's former wife—that the

file contained an outstanding contempt violation against plaintiff.[1]

Judge Merckle then engaged plaintiff in small talk, which lasted until Miss Bryant called to say she could not locate the file. Judge Merckle told Miss Bryant to return to the office, ended the phone conversation, and turned his attention to the check Harper had written for child support. As he examined it, Judge Merckle asked Harper where he lived. Plaintiff directed the judge's attention to the address on the check and said he lived in Boca Grande, Florida. When defendant observed that the "address" on the check indicated only a post office box number, plaintiff explained that there are no street addresses or numbers in Boca Grande and that mail there is delivered only to a post office. Judge Merckle then asked Harper *exactly* where he lived; plaintiff was responsive, giving the name of his apartment complex, the number of his apartment, and a business card that contained address information identical to that on the check. Then, in what can be characterized fairly as a most unusual request, Judge Merckle, still seated behind his secretary's desk, told plaintiff to raise his right hand to be sworn in.

The subsequent occurrences are the subject of some factual dispute. Harper testified that he promptly walked out of the office into the hall passing Miss Bryant, who was returning from the Clerk's office. Judge Merckle, again according to plaintiff's testimony, pursued him into the hall, told Miss Bryant to locate a deputy, and attempted to grab hold of plaintiff. Harper told the judge, "Don't you dare touch me," and Judge

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1. As a reason for his initial interference, Judge Merckle claimed that he was attempting to "help" plaintiff as well as clear up some outstanding judicial business. Defendant testified that there were

> some problems with Mr. Harper determining how much child support was owed, and I thought the Court file would reflect what was owed and also at the same time I believed there was some outstanding case against Mr. Harper for failure to pay a child support, and at which time he could have been served by another party, that being the Sheriff, and then that could have been presented to the proper court to determine whether or not he was in violation.

Record, Vol. II, at 151. In other testimony Judge Merckle stated that [a]nybody that walks in my judicial Chambers involves themselves with me because those are my Chambers as a judge for the State of Florida. . . ." *Id.* at 181.

Merckle did not. As defendant and his secretary looked for a deputy, Harper exited the building and attempted to find the nearby law office of a friend.

The defendant's testimony paints Harper as far more belligerent. Judge Merckle claimed that after he told Harper to raise his hand, Harper responded, " 'No mother fucker is going to swear me in,' "[2] and bolted from the office.

A chase scene ensued. Harper, whether he walked or ran from the courthouse, soon found he was being pursued by court bailiffs. He ducked into an office building in search of his attorney friend and proceeded to the second floor, only to be informed that his friend had relocated his office two weeks earlier. Harper then headed for the back stairs of the building, where he was trapped by the bailiffs. Plaintiff was then escorted to the front of the building by the bailiffs where he called out to bystanders, "Please, please, remember what's gong on." There, Harper testified, he was thrown against a fence and frisked in full view of the public.[3] The bailiffs then took Harper to Judge Merckle's office, were 10 or 15 people—besides Judge Merckle and a court reporter—awaited his arrival.

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2. The transcript of Judge Merckle's "rump" hearing, *see* pp. [ ]-[ ] *infra*, contains no reference to Harper's alleged use of profanities as a basis for defendant's actions. At the time of the hearing, Judge Merckle's reason for finding Harper in contempt was "[b]ecause [he] disobeyed a Court rule." *Id.* at [—]. But at the trial of this action Judge Merckle was quite clear on this point and even suggested that the language had made a deep impression upon him: "He [Harper] refused [to take an oath] and at the same time displayed vile, filthy, the most filthy language toward me I have ever witnessed." Record, Vol. II, at 163. In fact, Judge Merckle now claims that plaintiff's alleged use of profanity—a misdemeanor under Florida law—directed toward a judicial officer gave him jurisdiction over plaintiff.

3. For purposes of appeal, defendant has—with certain exceptions and amendments—concurred in plaintiff's factual summary. While defendant Merckle has not taken exception to Harper's facts concerning the scene that followed the bailiffs' successful apprehension of plaintiff, we do note that defendant's witness, Hillsborough County Deputy Sheriff James C. Evans, did testify that he and his co-bailiff did not throw plaintiff against any wall or fence. Record, Vol. II, at 284.

B. *The Hearing*

At this point, in chambers, Judge Merckle began a "contempt proceeding" of sorts. The record of that "hearing," in which defendant acted as complaining witness, prosecutor, factfinder, and judge, follows in its entirety.

IN THE COUNTY COURT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

In re: No. 10747

Jack Harper—Contempt of Court: Div. "A"

* * *

* * * * *

THE COURT: Let's go on the record. I would like to cite the facts.

MR. HARPER: I haven't been informed of my rights and I want an attorney. That's all I want.

THE COURT: Mr. Harper, just remain quiet just for a few minutes, please, sir.

All right, this is Friday, August 16, 1974. Mr. Harper came in my Chambers approximately, I'd say, three o'clock in the afternoon looking for Mrs. Pattie Harper or Judge Coe.

The purpose of coming in trying to find these two individuals was for Mr. Harper to pay some back child support I gather that he owed Mrs. Harper.

I tried to find Mr. Peaveyhouse, Mrs. Harper's attorney, to no avail. I also tried to check out the court file to assist Mr. Harper to find out what the delinquent child support was. Could not find the court file.

Because of not being able to find this, I told Mr. Harper the

best thing to do would be just go ahead and leave the check, if he wanted to.

I did not know if this was the correct amount or not, but this is his own choosing and he wrote out the check and left a check for $210 made payable to Mrs. Pattie Harper, dated August 16.

I also asked Mr. Harper what his address was in Boca Grande, as I understood that there are various summons outstanding, trying to get him served for his contempt proceedings in the Circuit Court for failure to pay child support.

MR. HARPER: Which Circuit Court?

THE COURT: Just a minute, Mr. Harper, please, sir.

MR. HARPER: I haven't received anything from any court other than I was supposed to make my payments.

THE COURT: Mr. Harper, just remain quiet.

MR. HARPER: From Polk County directly to Pattie Harper.

THE BAILIFF: Do you understand what the Judge is saying?

THE COURT: Mr. Harper, please remain quiet.

MR. HARPER: I can't say anything?

THE COURT: In a few minutes.

I asked Mr. Harper his address and I thought it might be better to put him under oath to find out where he did reside, so justice could be done.

He stated to me he wasn't about to be sworn, he wasn't there to tell me anything.

MR. HARPER: I didn't say that—anything—

THE COURT: And if anyone proceeded to hurt him or try to take him into custody, which I told him I might have to do, he said that they are going to have to do it in force. And he got up—

MR. HARPER: I did not say any force, either.

THE BAILIFF: Mr. Harper, please be quiet.

THE COURT: He got up and proceeded out. I told him to remain seated. He said he wasn't about to.

I sent my secretary for the Sheriff's Deputies and, as I understand it, from then on, that they had to give chase and in approximately fifteen or twenty minutes he has been brought back into my office.

MR. HARPER: Would you tell him exactly how you chased me?

THE COURT: Just a minute, Mr. Harper.

The whole basis of this hearing is whether or not you are in contempt of this Court for not remaining where you were.

The Court at this time does hold you in contempt so anything you care to say Mr. Harper, before the Court imposes any sentence on you?

All right sir.

MR. HARPER: Well, I said—I was sitting there. You said you wanted me to raise my hand. I said, "Why?" You said because you wanted to put me under oath. Exactly what you said. I said, "Why?" You said because you wanted to check my address.

You want to check my address, read my address. And then call Boca Grande. Boca Grande is only a city of two hundred, three hundred. You walk on the island, say, "Where is Jack Harper?" they are going to direct you to Jack Harper.

I am not trying to hide anything. I am in the real estate business down there. I am a registered real estate broker. I have a fishing business. I have a business in Lakeland. And I don't think it's too good, me to be roughed up, treated like I have been treated, after I make an effort, an effort to pay my ex-wife what she deservingly owes, as the good Court granted her.

If you would like to read back what he said to me, I would be glad to object to what he said, if you listen, because they are not exactly—you assumed words. You haven't said exactly right, exactly what has happened.

THE COURT: Well, Mr. Harper, like I have stated, the Court has found you in contempt of court.

MR. HARPER: For what?

THE COURT: Mr. Harper, at this time, I am not going—

MR. HARPER: How can I be in contempt of court when I have paid my dues?

THE COURT: Just be quiet, please, sir.

MR. HARPER: I tell you, man, this is really crazy.

THE COURT: What I am going to do, sir, before the Court imposes sentence—in fact, I am not going to impose any sentence at this time.

Mr. Harper, can you be here Monday morning at nine o'clock?

MR. HARPER: No, I will be out of town.

THE COURT: All right, sir, then, I will put you in custody. You will be here. All right, sir.

MR. HARPER: For what?

THE COURT: Be back in this court—

THE BAILIFF: Contempt of Court.

THE COURT: Have him back in this court at that time, Monday morning at nine o'clock.

MR. HARPER: I will be here—wait a minute—wait a minute—wait a minute.

Now, why is all this happening?

THE COURT: Because you disobeyed a Court rule.

MR. HARPER: Where was the Court?

THE COURT: Just take him out, Mr. Pinegar.

MR. HARPER: Where is the Court? I want an attorney man.

(Hearing concluded at 3:50 p. m.)

Following the "hearing," Harper was placed in a small room to await transportation to jail. He testified that he was threatened during the wait by a man who raised a fist at him but did not strike him. Harper was allowed to call his wife. He informed her of his predicament and asked that she contact an attorney. Fifteen minutes later Harper was placed in a paddy wagon and transported to the county jail, where he was to spend his weekend. At the jail, plaintiff was fingerprinted. His personal effects were inventoried. He was photographed and put into a 6 X 8 foot hot, noisy, jail cell equipped with a small, dim twenty-four hour light, a lavatory and a urinal. Conditions were, as Harper testified, squalid:

> They gave me about an inch thick foam-rubber pad to put on a piece of metal there in the jail so I could sleep on, but it smelled so bad that there's no way that I could possibly ever have laid on it.
>
> I in turn cut my pants off because it was so hot, and made shorts, and I must have killed several hundred

> roaches while I was in there. It was just, it was—the smell, it smelled with vomit and human waste in the cell....

Record, Vol. II, at 58. Plaintiff further testified that his life was threatened, though he was not physically molested, by a prisoner peeved that Harper had no cigarettes. Efforts by Harper's attorney, directed to Judge Merckle, to obtain plaintiff's early release on bail were absolutely fruitless.[4]

On Monday morning, Harper was chained to about a dozen prisoners and loaded into a van. He was then paraded in shackles past his former wife, through the very hall where the incident occurred, and toward the courtroom. Soon he was brought before Judge Merckle, who postponed sentencing one week to accommodate plaintiff's attorneys and released Harper from custody. The following Monday plaintiff returned to Judge Merckle's courtroom and was sentenced to three days' incarceration with credit for time already spent in jail. He was, at that time, also served with a summons for a domestic relations hearing on the amount of his child support payments.[5] Harper's contempt conviction ultimately was reversed by a Florida state court on appeal.

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4. Defendant suggests in his brief that because Harper's counsel chose to present the bail release question to defendant, "Harper's continued confinement ... [can be] attribut[ed] to ... the choice of Harper's counsel." Brief for Appellee at 16 n. 6. This bold conclusion comprises an arrant *non sequitur*, so much so that we abort it at this early point in our decision. Had Harper's counsel sat idle, Harper, we can reasonably assume, would have spent his weekend in jail. Thus, counsel's approach to Judge Merckle on the bail issue hardly could be the cause of Harper's "continued confinement." Defendant seems to argue further along these lines that Harper's counsel should have presented the issue to another judge, who would have released Harper. This ostensibly concedes that a neutral and detached judge would have seen the error and/or illegality of Judge Merckle's acts and would have released plaintiff. In sum, we must concur in Harper's appraisal of defendant's argument on this score: "it is an affront to intelligence."

5. The eventual outcome of the domestic relations hearing was an increase in Harper's child support payments by five dollars per week.

C. *Procedural History*

Harper filed his complaint on August 8, 1975 alleging with factual particularity a cause of action against Judge Merckle arising under 42 U.S.C. § 1983 (1976) for violation of Harper's constitutional rights. The complaint was based jurisdictionally on 28 U.S.C. § 1343 (1976) and demanded a judgment for damages and costs. After two recusals, the case came to rest in the hands of George C. Young, Chief Judge, U.S. District Court for the Middle District of Florida. Defendant's motion to dismiss based upon his alleged immunity from suit was denied on April 26, 1977. Following additional pleading and discovery, on March 26, 1979 the case went to trial, which culminated in a jury verdict on special interrogatories for Judge Merckle. The trial court entered judgment on the verdict and subsequently denied Harper's Fed.R.Civ.P. 59 motion for new trial. Harper noticed timely appeal from the entry of judgment and the denial of new trial.

D. *Special Interrogatories*

During trial of this § 1983 action, defendant twice moved for directed verdict. The district court denied the first motion, made at the close of plaintiff's evidence, but withheld its ruling on the renewed motion, determining that the proper course was to submit special interrogatories[6] to the jury. The purpose of

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6. The special interrogatories with jury responses noted in brackets, were as follows:

WE THE JURY find that the answers to the following interrogatories are as hereinafter stated:

1. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that on August 16, 1974 in Judge Merckle's chambers the plaintiff, JACK HARPER, used profane language in addressing Judge Merckle when asked to be sworn for the purpose of obtaining Harper's residence address?

[YES]_____

2. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that on August 16, 1974 the plaintiff, JACK HARPER ran from and attempted to flee the two deputies who were assigned to return Harper to Merckle's chambers?

[YES]_____

3. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence, that on August 16, 1974 in the hearing held in

Judge Merckle's chambers the plaintiff, JACK HARPER, was disruptive of the proceedings?

[YES]_____

4. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that the defendant, ARDEN MERCKLE, confined or caused to be confined Jack Harper in the Hillsborough County Jail from August 16, 1974 until August 19, 1974?

[YES]_____

5. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that the defendant, ARDEN MERCKLE intended to confine Jack Harper in the Hillsborough County Jail for the dates aforesaid at the time of such confinement?

[YES]_____

6. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that his confinement was illegal, that is, without lawful authority for such incarceration?

[NO]_____

7. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that he was aware of the confinement and suffered damages therefrom?

[NO]_____

If your answers to Interrogatories, 4, 5, 6 and 7 above were all "yes", then you could proceed to consider and answer Interrogatories 8 and 9; however, if your answer to any one of Interrogatories 4, 5, 6 and 7 was "no", then you should *not* consider these Interrogatories any further but should return your verdict in open court.

8. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that there was reasonable basis for Merckle's belief that the detention of Harper was lawful?

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9. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that in causing the confinement of Harper, Merckle acted in good faith?

_____

If your answer to both of Interrogatories 8 and 9 was "yes", then you should *not* consider the following interrogatories, but should return your verdict in open court. If, however, your answer to either or both of Interrogatories 8 and 9 was "no", then you should proceed to consider and answer Interrogatories 10 and 11 below.

10. What, if any, is the amount of monetary compensatory damages the plaintiff, JACK HARPER, has proved by a preponderance of the evidence that he has suffered as a proximate cause of the actions of the defendant, ARDEN MERCKLE?

_____

11. What, if any, is the amount of punitive damages that the plaintiff, JACK HARPER, has proved by a preponderance of the evidence that he is entitled to receive from the defendant, ARDEN MERCKLE?

_____

SO SAY WE ALL.

[s/by Foreman]_____

DATED this [30] day of March, 1979.

interrogatories 1-3, according to the district court, was "informational." Interrogatories 4-7 [7] were intended to determine whether plaintiff established a prima facie case. Merckle's defenses were embodied in interrogatories 8-9, and Harper's damages were covered in interrogatories 10-11.

II. *Absolute Judicial Immunity*

[1] Defendant asserts that notwithstanding his failure to press the point at trial,[8] this Court should consider whether he is absolutely immune from suit because our cases mandate affirmance of a district court decision whose "result is correct . . . [al]though based upon an improper ground." *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979). *See SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); *Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 980, 99 S.Ct. 1787, 60 L.Ed.2d 240 (1979). Judge Merckle's assertion is correct; accordingly, we consider the immunity question.

[2, 3] Section 1 of the Civil Rights Act of 1871, 17 Stat. 13 (Apr. 20, 1871), presently 42 U.S.C. § 1983 (1976) under which plaintiff Harper proceeds, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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7. The record reveals the considerable concern, agitation and ambivalence of court and counsel concerning interrogatories 4-7. Originally, the court proposed that only 4, 5 and 7 be submitted to the jury, but as its view of the elements of a prima facie case changed, the court included interrogatory 6, addressing the issue of unlawfulness.

8. Defendant did, however, clearly raise the affirmative defense of absolute judicial immunity in "Defendant's Answer and Affirmative Defenses to Plaintiff's Complaint," filed June 15, 1977. Thus, the difficulties present in *Boyd v. Carroll*, 624 F.2d 730 (5th Cir. 1980) are not involved.

We accept,[9] however, that "[e]very person," means "every person *except* judges," *Pierson v. Ray*, 386 U.S. 547, 559 87 S.Ct. 1213, 1220, 18 L.Ed.2d 288 (1967) (Douglas J., dissenting), who generally have been accorded the unique treatment embodied in the term "absolute immunity." The cases establish "as a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[10] *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). To determine whether Judge Merckle indeed acted within the "outer perimeter," *Barr v. Matteo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959), of "the authority vested in him," 80 U.S. (13 Wall.) at 347, we turn to

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9. In *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) the Court determined that the record of Congressional proceedings that accompanied the passage of what is now 42 U.S.C. § 1983 (1976) "gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. at 554, 87 S.Ct. at 1217. *But see* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 Nw.U.L. Rev. 615, 620-23 (1970) Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322 Passim (1969). Thus, we take as settled law the proposition that in the *vast* majority of § 1983 cases in which judges are named as defendants, judicial immunity will bar the action. Moreover, as our analysis *infra* at p. 859 reveals, we can envision no situation—where a judge acts after he is approached *qua* judge by parties to a case—that could possibly spawn a successful § 1983 suit. In fact, we note that even a judge who is approached as a judge by a party for the purpose of conspiring to violate § 1983 is properly immune from a damage suit. *See Sparks v. Duval County Ranch Co., Inc.*, 5 Cir., 604 F.2d 976 (1979) (en banc), *aff'd sub nom. Dennis v. Sparks*, ___ U.S. ___, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). *But cf. Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980).

10. Although ensuring the independence of the judiciary is a crucial policy basis supporting judicial immunity, it is but one of many such policies. Others include: (1) need to avoid vexatious litigation against judges; and (2) need for an end to litigation. *See generally* King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L.Rev. 549, 579-88 (1978); Nagel, *Judicial Immunity and Sovereignty*, 6 Hast.Const.L.Q. 237, 239-60 (1978); McCormick & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 Rutg.-Camd.L.J. 65, 69-73 (1976).

the cases decided by the Supreme Court and our Court bearing upon this question.[11]

From the earliest days of our Republic to the present, only on five occasions has the Supreme Court addressed squarely the issue of judicial immunity.[12] Only the first case, *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 19 L.Ed. 285 (1863), contains a hint of equivocation. There, plaintiff, an attorney, attempted to bring suit against the judge who disbarred him. Drawing heavily on English authority, Justice Field held the defendant judge immune from tortious liability. "Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness." *Id.* at 526. But in so holding, Justice Field also wrote that judicial immunity was to obtain "unless perhaps where the [judicial] acts, in excess of jurisdiction, are done *maliciously or corruptly*." *Id.* (emphasis added). Three years later in *Bradley v. Fisher, supra*, Justice Field dis-

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11. The modern history of judicial immunity properly is introduced with reference to *Floyd v. Barker*, 77 Eng.Rep. 1305 (Star Chamber 1607). In that case, Lord Coke based his argument for judicial immunity upon an institutional *sine qua non*, the need for an end to litigation: without the doctrine "there will never be an end of causes ... [and] controversies will be infinite." *Id.* at 1306. The law of judicial immunity developed further with Lord Coke's decision in *The Case of the Marshalsea*, 77 Eng.Rep. 1027 (C.P.1610). There, he explored the characteristics and ramifications of an "act *coram non judice*," loosely interpreted as action by a court without jurisdiction to so act. These early insights still figure prominently in judicial analysis of the immunity issue, as much of the authority cited in this opinion demonstrates. Indeed, Lord Coke's impact is evident in James Kent's decision in *Yates v. Lansing*, 5 Johns. 282 (N.Y.Sup.Ct.1810), *aff'd* 9 Johns. 395 (N.Y.1811). *But cf.* Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L.Rev. 201, 224-43 (1980).

12. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Alzua v. Johnson*, 231 U.S. 106, 34 S.Ct. 27, 58 L.Ed. 142 (1913); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1871); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 19 L.Ed. 285 (1868). Only *Stump* and *Pierson* dealt with judicial immunity from suit under 42 U.S.C. § 1983 (1976). *Cf. Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

missed his earlier language as *obiter dictum* and plugged the gap opened by the "malice" language of *Randall*.[13] In so doing he set the stage for the next century or so of consistent jurisprudential development in the area.

The most recent and authoritative pronouncement on this question is *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Plaintiff, Linda Kay Spitler Sparkman, sued Judge Stump under § 1983 in connection with his approval of an *ex parte* petition to have plaintiff sterilized. Sterilization had been sought by plaintiff's mother, who was concerned that her "somewhat retarded" daughter's occasional nocturnal association with "older youth or young men" might result in pregnancy. *Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement, reprinted in* 435 U.S. at 351 n. 1, 98 S.Ct. at 1102 n. 1. Plaintiff was not told the true purpose of the operation but was told she was to have an appendectomy. After she married, plaintiff's "inability to become pregnant led her to discover" "the true nature of her surgery." *Id.* at 353, 98 S.Ct. at 1103.

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13. *See Bradley*, 80 U.S. (13 Wall.) at 351. That Justice Field was not detained by the "malice" language in *Randall* is evident in his discussion of that case in *Bradley*:

> The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.
>
> In the present case we have looked into the authorities and are clear, from them as well as from the principle on which any exception is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.

[4] The Supreme Court held Judge Stump immune from suit under the civil right statute. In the process, the Court cast aside considerable debris[14] that tended only to burden analysis such as this, and elucidated a cogent two-part test that—under the unusual and rare facts of this case—leads us to conclude that Judge Merckle *cannot* assert absolute judicial immunity. The Court extended the protection of judicial immunity to all "judicial acts"[15] unless those acts fall clearly outside the judge's subject matter jurisdiction. *Stump, supra,* 435 U.S. at 359-64, 98 S.Ct. at 1106-08. *Watson v. Interstate Fire & Cas. Co.*, 611 F.2d 120 (5th Cir. 1980); *see generally Williams v. Rhoden*, 629 F.2d 1099 at 1101 (5th Cir. 1980); *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980), *cert. denied*, ____U.S.____, 101 S.Ct. 269, 66 L.Ed. 2d ____ (1980); *Henzel v. Gerstein*, 608 F.2d 654 (5th Cir. 1979); *Almon v. Sandlin*, 603 F.2d 503 (5th Cir. 1979); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Carmack v. Gibson*, 363 F.2d 862 (5th Cir. 1966). We must ask, then, (1) whether Judge Merckle's actions on August 16, 1974 were "judicial acts," and if

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14. Here we refer to the Court's textual admonition that reviewing courts' visceral aversions to defendants' assertedly "judicial" actions amount to nothing in immunity analysis. "Disagreement with the action taken by the judge," wrote Justice White for the Court, "does not justify depriving that judge of his immunity." 435 U.S. at 363, 98 S.Ct. at 1108. Indeed, Justice Field recognized in 1871 that "[c]ontroversies involving ... the liberty and character of the parties, and consequently exciting the deepest feeling" comprise precisely the "class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the [judge's] decision...." *Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 348.

A second shibboleth buried by the Court in *Stump* is the notion, erroneously regarded as significant by the Seventh Circuit in its consideration of the case, *see Sparkman v. McFarlin*, 552 F.2d 172, 174 (7th Cir. 1977), that a judge's "failure to comply with elementary principles of procedural due process," *id,* require him to shed his cloak of immunity.

Somewhat along these lines, the Court also suggested in *Stump* that the degree of tragedy wrought by a defendant judge's action does not stand as an independent factor to be weighed in an immunity analysis. *See* 435 U.S. at 363, 98 S.Ct. at 1108. Thus, we do not intimate, and indeed consider it inappropriate to do so, that Judge Merckle's actions were more or less egregious than Judge Stump's.

15. *See generally Watson v. Interstate Fire & Gas Co.*, 611 F.2d 120 (5th Cir. 1980); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).

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15. *See generally Watson v. Interstate Fire & Gas Co.*, 611 F.2d 120 (5th Cir. 1980); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).

so, (2) whether or not they fall clearly outside his jurisdiction[16] as a county judge in the State of Florida.

[5, 6] What is or is not a "judicial act" is not wholly free from doubt. *See generally Crowe v. Lucas*, 595 F.2d 985, 990 (5th Cir. 1979); *Slavin v. Curry*, 574 F.2d 1256, 1263-64 (5th Cir.), modified on other grounds, 583 F.2d 779 (5th Cir. 1978), *overruled on other grounds, sub nom. Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis v. Sparks*, ____U.S.____, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). *Stump* does reveal several characteristics of a "judicial act" drawn in part from our decision in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972), which the Court cited approvingly. In *McAlester*, a Texas judge inexplicably lost his temper and jailed for contempt as elderly and somewhat deaf man, James O. McAlester. McAlester had come with his wife to deliver fresh clothing to their son who was incarcerated and due to stand trial before the defendant later that day. The judge in *McAlester* was held immune from suit under § 1983. For the Court, Judge Goldberg wrote that "four factors . . . when taken together, compel the conclusion" that a judicial act was involved:

> (1) the precise act complained of, use of the contempt power, is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

469 F.2d at 1282. Judge Merckle, in asking Harper to raise his

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16. While our resolution of the case eliminates the need to determine whether Judge Merckle's actions were within his jurisdiction, we do note that *Stump* Mandates a broad construction of the term "jurisdiction." *See* 435 U.S. at 357, 98 S.Ct. at 1105; *see also Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973). In fact, the Court in *Stump* drew on *Bradley's* distinction between acts "in excess of jurisdiction" (criminal court judge convicts plaintiff for a nonexistent crime, *cf. Turner v. Raynes*, 611 F.2d 92, 93-97 (5th Cir. 1980)) and acts "in clear absence of all jurisdiction" (probate judge tries a criminal case), *see Bradley v. Fisher*, *supra*, 80 U.S. (13 Wall.) at 352. Immunity is lost to the judge only in the latter class of jurisdictionally defective cases.

right hand to be sworn in, and in later finding Harper in contempt, most assuredly was performing a "normal judicial function." And Judge Merckle's allegedly unconstitutional actions clearly took place "in the judge's chambers." But under the third and fourth factors of *McAlester*, Judge Merckle's position loses ground. The controversy that led to Harper's incarceration did not center around any matter "then pending before the judge"; rather, it centered around the domestic problems of one of the Judge's friends, Harper's former wife. These problems were brought to the Judge's attention in a social, not judicial, forum. Moreover, as the facts clearly establish, Harper did not visit Judge Merckle "in his official capacity." To the contrary, Harper sought only his former wife, whose office was adjacent to Judge Merckle's chambers, to settle his account with her.

The emphasis that we place upon the third and fourth factors of *McAlester* is clearly warranted under the language of *Stump*. There Justice White distilled the relevant cases addressing the term "judicial act" and concluded that consideration must be given not only to "the nature of the act itself" but also "to the expectations of the parties." 435 U.S. at 362, 98 S.Ct. at 1107, *see Crowe v. Lucas*, *supra*, 595 F.2d at 990. While in *Stump* "both factors indicate[d] that ... approval of the sterilization petition was a judicial act," 435 U.S. at 362, 98 S.Ct. at 1107 (footnote omitted), in the case before us they do not. We think it clearly unreasonable to conclude that Harper entertained the expectation that judicial matters were at hand when he entered Judge Merckle's office on nonjudicial business. Plaintiff's incredulity during the "hearing," *see supra* at pp. [851]-[853], indicates as much.

Stump and *McAlester*, the guiding lights in our analysis, point in one direction: Judge Merckle's actions on August 16, 1974 were not "judicial acts." But we caution that our holding is exceedingly narrow and is tailored to this, the rarest of factual

settings. Succinctly stated, we hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to "judicial acts." These nonjudicial acts, to state the obvious, are not cloaked with judicial immunity from suit under § 1983.

We find, accordingly, that Judge Merckle should not be accorded absolute judicial immunity because his acts were not "judicial acts." As such, we need not reach the question of whether he acted in complete absence of jurisdiction.

III. *Special Interrogatories*

Plaintiff claims that the trial court erroneously submitted interrogatories 4, 5, 6, and 7[18] to the jury. This argument is urged on several levels. First, plaintiff states the four interrogatories correspond to what the trial court *mistakenly* regarded as the four elements of the tort of false imprisonment. Second, plaintiff argues that interrogatory 7's subject matter—awareness of confinement and resultant damages—was "irrefutably established" and thus too clear for submission as an interrogatory. We consider these arguments now.

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17. To exemplify the extremely limited applicability of our holding we point out that our considerable research has revealed only one case, *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978), arguably within the ambit of our holding. *See generally* Rosenberg, *Stump v. Sparkman; The Doctrine of Judicial Impunity*, 64 Va.L.Rev. 833, 848 n.65 (1978). There, defendant, a traffic court judge sent a deputy sheriff out to purchase some coffee from a coffee vendor. Both judge and deputy sheriff tasted the coffee and concluded it was "putrid." On the defendant judge's orders, the coffee vendor was handcuffed, brought before the judge in his chambers, and subjected to "20 minutes" of the judge "screaming at him, threatening him and his livelihood . . . and thoroughly scaring him." *Id.* at 53. After his first release, the vendor was again brought before the judge for an abbreviated, but similar encounter. The reported case does not even address the immunity issue, presumably because the judge was willing to concede his actions were not "judicial acts," but dealt in large part with the propriety of a $60,000 punitive damages jury award for the coffee vendor. That award was affirmed.

18. *See* note 6 *supra*.

A. *Prima Facie Case*

The elements of the tort of false imprisonment, so reiterated by our own Court in *Bryan v. Jones*, 530 F.2d 1210, 1213 (5th Cir.), *cert. denied*, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976), are: "(1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. . . ." To state a claim upon which relief can be granted for the commission of a *constitutional* tort, plaintiffs additionally must satisfy the prerequisites of 42 U.S.C. § 1983 (1976).

[7, 8] Plaintiff Harper, in a gossamer assertion, states that "illegality" need not be proved as part of his prima facie case; rather, the notion of legality *vel non* properly enters this case only by way of defendant's affirmative defense. We observe first that Harper's own complaint, wherein he alleges four times that defendant acted "unlawfully," belies his present position. Second it is beyond peradventure that § 1983 targets *illegal* not legal action under color of state law.[19] A constitutional tort has both constitutional and tortious dimensions. When the tort is false imprisonment, *Bryan, supra*, controls as to the elements of the tort. But regardless of the underlying tort, resort must be to § 1983, which requires in the clearest of terms a deprivation of a constitutional right, i. e., an *illegality*, under color of state law. That "illegality" is an obvious and inherent element of Harper's prima facie § 1983 case is without doubt. The apparent cause of plaintiff's confusion on this point is the language in *Bryan*, cited by plaintiff, which states: "[I]ntent to imprison *without legal authority* need not be proved as an element of the prima facie case," 530 F.2d at 1213 (emphasis in original) (footnote omitted). By that language the Court meant only that a defendant's *belief* that his actions are lawful, a question quite apart from legality *vel non*, is relevant as an affirmative defense. *See id.* ("Thus, a prima facie case is made out against a jailer even when

19. Any doubt on this point is resolved in *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979) ("the first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' "). Moreover, in that case, the Supreme Court warned us not to view a " '[§] 1983 false imprisonment action' exclusively in terms of traditional tort-law concepts. . . ." *Id.* at 142, 99 S.Ct. at 2693.

he believes he has legal authority to detain a prisoner. Accordingly, whatever impact his good faith has, it must be as an element of a defense").

[9, 10] Although we do not doubt that "illegality" must be proved by the plaintiff in a § 1983 false imprisonment, we nonetheless find error in submitting that issue to the jury. The illegality of Judge Merckle's actions could hardly be more lucid. Defendant's theory at trial was that he was acting as a "conservator of the peace"[20] when he jailed Harper. Such an officer has the power to arrest and to commit pending trial. Judge Merckle did more; he acted as complaining witness, "arresting" officer —although Harper was not formally arrested—finder of fact, and judge.[21] All of these actions were taken without regard for the Fourteenth Amendment, *see Anderson v. Nosser*, 456 F.2d 835, 841 (5th Cir.) *cert. denied* 409 U.S. 848, 93 S.Ct. 53, 34 L.Ed.2d 89 (1972), or the Constitution of the State of Florida, *see e. g.*, Fla.Const. Art. I, § 14 (bail as a matter of right).

Judge Merckle's actions were, then, clearly illegal.[22] And in the face of such obvious illegality, the district court committed reversible error by submitting that question to the jury.

B. *Interrogatory 7*

[11] This interrogatory, to reiterate, addresses plaintiff's

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20. Fla.Const. art. V. § 19 provides: "All judicial officers in this state shall be conservators of the peace." Similarly, Fla.Stat.Ann. § 901.01 (West Cum.Supp.1980) states: "Each state judicial officer is a conservator of the peace and a committing magistrate with authority to issue warrants of arrest and commit offenders to jail and recognize them to appear to answer the charge...."

21. While a judicial officer who witnesses a contempt in his own courtroom may be said to be acting in several roles as well, the alleged courtroom contemnor of course would have, as Harper did not here, benefit of counsel.

22. We hasten to point out that illegality *per se* of Merckle's actions has no effect on the judicial immunity issue. For this proposition, we look no further than *Stump:* so long as he meets the test (judicial act not clearly outside his subject matter jurisdiction), a "judge is absolutely immune from liability ... even if his exercise of authority is flawed by the commission of grave procedural errors." 435 U.S. at 359, 98 S.Ct. at 1106.

awareness of his confinement and his resulting "damages." Although the inexplicable jury response to interrogatory 7 was negative, the appropriate answer to the question shines forth from the facts, the evidence, and the pretrial stipulation.

As to the first part of the compound question posed by interrogatory 7, we note that nowhere does Judge Merckle assert that Harper was "unaware" of his confinement. Moreover, that element of a prima facie case is usually only relevant in rare circumstances, *e. g.*, when a plaintiff allegedly slept through the commission of a tort on his person. *See* Restatement (Second) of Torts § 42, Comment a (1965). Accordingly, submission of the interrogatory to the jury was erroneous as it suggested doubt concerning an undisputed issue.

As to the "damages" aspect of interrogatory 7, we also find error. The interrogatory unfortunately contained the word "damages" when no doubt the term "harm" should have been used as it was in both *Bryan v. Jones, supra*, 530 F.2d at 1213, and Restatement (Second) of Torts § 35 (1965), upon which *Bryan* was based. Defendant, however, attempts to justify this language arguing that the jury was instructed to "weigh Harper's own conduct and prior actions in determining damages" and in so doing "could reasonably conclude that Harper caused any and all damages by his criminal or contemptuous conduct." This misses the mark; the issue of "damages"—entirely separate from the question of "harm"—was covered expressly by interrogatories 8 and 9, which, per the court's instructions, the jury never reached. If the jury did in fact "weigh Harper's own conduct" in answering interrogatory 7, as defendant himself suggests, then the commission of reversible error occurred in fact as well as in law.

IV. *Requested "Pretrial Procedure" Jury Instructions*

[12] Defendant asserted at trial that he was entitled to qualified immunity since his actions—the very ones we hold to be nonjudicial—were consistent with his state constitutional

status as a conservator of peace.[23] We regard that status for purposes of the immunity question, as analogous to that of a police officer empowered to arrest and detain suspected violators of the law. Accordingly, the immunity potentially applicable to Merckle is qualified: he would be immune from damage liability under § 1983 unless "he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of [plaintiff] . . ., or if he took the action with the malicious intention to cause a deprivation of [plaintiff's] constitutional rights. . . ." *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975). Essentially, then, defendant may show "good faith and probable cause," *Pierson v. Ray, supra*, 386 U.S. at 557, 87 S.Ct. at 1219, clearly a cognizable defense under § 1983, *id; Bryan v. Jones, supra.*

These principles were recognized by the district court and were embodied in special interrogatories 8 and 9 submitted to the jury. Plaintiff, however, argues that the trial court committed reversible error through its refusal to charge the jury the

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23. *See* note 20 *supra*. We have no difficulty concluding that Judge Merckle, though not acting in a "judicial" role under our holding, might have been acting in another capacity recognized by the law of Florida. *Cf. Gregory v. Thompson*, 500 F.2d 59, 63-65 (9th Cir. 1974).

text of Fla.R.Crim.P. 3.130(a) & (b).[24] The contention is that the relevant subsections of the Florida rule, which deals with bail[25] and first appearance procedures, could have given the jury a basis upon which to determine good faith *vel non*. The defendant counters that this infirmity can only be viewed as harmless, since the jury never reached the qualified immunity issue, as the responses to the special interrogatories indicate.

[13] While we agree that the relevant subsections of the Florida rule are germane to the question of good faith in its

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24. The rule's first two subsections state:

(a) Offenses Less Than Capital. All persons in custody for the commission of an offense unless it is a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great shall be entitled as of right to be admitted to bail before conviction. After conviction bail may be granted in the discretion of either the trial or appellate court.

(b) First Appearance.

(1) Prompt First Appearance.

Except when he has been previously released in a lawful manner, every arrested person shall be taken before a judicial officer within twenty-four (24) hours of arrest. The chief judge of the circuit for each county within the circuit shall designate one or more judicial officers from the circuit court, or county court, to be available for first appearance and proceedings.

(2) Advice to Defendant.

Upon the defendant's first appearance the magistrate shall immediately inform him of the charge and provide him with a copy of the complaint. The magistrate shall also adequately advise the defendant as follows:

(i) That he is not required to say anything, and that anything he says may be used against him;

(ii) If he is as yet unrepresented, that he has a right to counsel, and, if he is financially unable to afford counsel, that counsel forthwith will be appointed.

(iii) That he has a right to communicate with his counsel, his family, or his friends, and that, if necessary, reasonable means will be provided to enable him to do so.

Fla.R.Crim.P. 3.130(a) & (b).

25. Plaintiff concedes that "the portion [of the rule] regarding bail was substantially covered by the Court" but insists, and we agree, that "the balance of the instruction was entirely proper and relevant."

"objective" sense,[26] we think defendant's argument—that this error alone could not be reversible—is well taken. Accordingly, and in light of our reversal on other grounds, we need not hold that failure to charge both requested portions of the Florida rule constituted reversible error. Instead, we instruct the trial judge to so charge the jury on retrial of this case, providing the defendant asserts the defense of qualified immunity.

V. *Conclusion*

As indicated in our detailed treatment of the issues above, we hold first that defendant may not assert absolute immunity under the facts of this case and second that the special interrogatories submitted to the jury by the trial court contained reversible error. Accordingly, we reverse the judgment entered by the district court and remand the case for new trial.

REVERSED and REMANDED.

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26. *See Bryan v. Jones, supra*, 530 F.2d at 1214 (good faith standard "contains both a subjective element of good faith and an objective element of reasonableness").

Appendix B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

CASE NO. 79-2335
DISTRICT COURT CASE #75-583-Civ-T-Y

JACK R. HARPER,
Plaintiff/Appellant

vs.

ARDEN MAYS MERCKLE,
Defendant/Appellee

Appeal from the United States District Court for the Middle District of Florida.

Before Hill, Kavitch, and Hatchett, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellant, the cost on appeal to be taxed by the Clerk of this Court.

March 5, 1981.

Issued as Mandate: April 21, 1981.

Appendix C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

CASE NO. 79-2335

JACK R. HARPER,
Plaintiff/Appellant

vs.

ARDEN MAYS MERCKLE,
Defendant/Appellee

PETITION FOR REHEARING

COMES NOW the Appellee, ARDEN MAYS MERCKLE, by his undersigned counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure would show:

I

In determining that Judge Merckle did not have absolute judicial immunity, this Court has overlooked or misapplied certain points of fact and law specifically.

II

FACTS

Merckle's theories at trial were that he was acting as a judge (the contempt theory) *and* a conservator of the peace (arresting a misdemeanant for an offense committed in his

presence.)[1] The contempt theory also supported the judicial immunity claim. Distilled to the bare essentials, the facts relating to the judicial immunity theory are:

1. Harper entered Merckle's office to pay his ex-wife certain monies.

2. Sometime thereafter, Merckle attempted to place Harper under oath.

3. Harper did not comply, but instead cursed the judge.[2]

4. The judge then ordered Harper to stay where he was, but Harper left.

5. Harper was returned by bailiffs and a contempt hearing ensued.

III

LAW

This Court correctly recognized that for judicial immunity to attach, Merckle had to perform a judicial act within his subject matter jurisdiction. Harper, p. 4214-4215; *Stump*, 98 S.Ct. at 1106-08. This Court did not determine whether Merckle's action was within his subject matter jurisdiction [Harper, p. 4215 n.16], because it determined that Merckle did not perform a "judicial act".

To determine whether an act is a judicial one, a two prong test must be applied:

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1 Contrary to the assertion at p. 4217 of the Opinion, Merckle presented both theories; not just the conservator of the peace theory. Furthermore, contrary to the assertion at n.21 at p. 4218, the alleged courtroom contemptor need not have counsel before being held in direct criminal contempt. If a spectator in a court proceeding stands up and calls a judge a "mother fucker", the Court may hold him in contempt without appointing counsel.

2 Special interrogatory number one irrefutably established this fact for purposes of this appeal.

> "The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump*, 98 S.Ct. 1107.

This Court acknowledged that the first prong is satisfied when it determined that "Judge Merckle, in asking Harper to raise his right hand to be sworn in and in later finding Harper in contempt, most assuredly was performing a normal judicial function".

This Court's error is that it focused upon the expectations of the parties *at the wrong point in time*. What Harper's expectations were when he entered Merckle's chambers is quite beside the point. He was not constrained or confined in any manner at that point. No arguable restraint was placed upon Harper until *after* he refused to be sworn and after he cursed the judge. *A reasonable man in a judge's chambers, facing a known judge who is attempting to put him under oath, expects that judicial matters are at hand.* Both aspects of the Stump "judicial act" test are met in this case.

IV

Since a "judicial act" is present in this case, this Court must answer the question reserved at p. 4215, n.16 of the Harper Opinion. That issue is adequately addressed in the briefs.

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3 Although the Stump court looked to this Court's prior decision in *McAlester v Brown*, 469 F2d 1280 (5th Cir. 1972) for guidance, it did not adopt the four part test in McAlester. Merckle notes that McAlester's "expectation that judicial matters were at hand" implied by the stated facts of that case was no greater than Harper's.

CONCLUSION

WHEREFORE, Merckle respectfully requests that rehearing be granted, that the Opinion withdrawn and that the judgment of the lower Court be affirmed on the basis that Merckle was absolutely immune from liability.

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(813) 225-1655

Counsel for Appellee

Barry A. Cohen

Richard G. Pippinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Ted R. Manry, III, P.O. Box 1531, Tampa, Florida, on this the 11th day of March, 1981.

Barry A. Cohen

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT
UNIT B

NO. 79-2335

JACK R. HARPER,
Plaintiff-Appellant,

versus

ARDEN MAYS MERCKLE,
Defendant-Appellee.

U.S. Court of Appeals filed Apr 7, 1981
GILBERT F. GANUCHEAU, Clerk

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(April 7, 1981)

Before HILL, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Appendix D

The special interrogatories with jury responses noted in brackets, were as follows:

WE THE JURY find that the answers to the following interrogatories are as hereinafter stated:

1. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that on August 16, 1974 in Judge Merckle's chambers the plaintiff, JACK HARPER, used profane language in addressing Judge Merckle when asked to be sworn for the purpose of obtaining Harper's residence address?

[YES] _____

2. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that on August 16, 1974 the plaintiff, JACK HARPER ran from and attempted to flee the two deputies who were assigned to return Harper to Merckle's chambers?

[YES] _____

3. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence, that on August 16, 1974 in the hearing held in Judge Merckle's chambers the plaintiff, JACK HARPER, was disruptive in the proceeding?

[YES] _____

4. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that the defendant, ARDEN MERCKLE, confined or caused to be confined Jack Harper in the Hillsborough County Jail from August 16, 1974 until August 19, 1974?

[YES] _____

5. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that the defendant, ARDEN MERCKLE intended to confine Jack Harper in the Hillsborough County Jail for the dates aforesaid at the time of such confinement?

[YES] _____

6. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that his confinement was illegal, that is, without lawful authority for such incarceration?

[NO]

7. Has the plaintiff, JACK HARPER, proved by a preponderance of the evidence that he was aware of the confinement and suffered damages therefrom?

[NO]

If your answers to Interrogatories, 4, 5, 6 and 7 above were all "yes" then you would proceed to consider and answer Interrogatories 8 and 9; however, if your answer to any one of Interrogatories 4, 5, 6 and 7 was "no", then you should not consider these Interrogatories any further but should return your verdict in open court.

8. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that there was reasonable basis for Merckle's belief that the detention of Harper was lawful?

_____

9. Has the defendant, ARDEN MERCKLE, proved by a preponderance of the evidence that in causing the confinement of Harper, Merckle acted in good faith?

_____

If your answer to both of Interrogatories 8 and 9 was "yes", then you should not consider the following interrogatories, but should return your verdict in open court. If, however, your answer to either or both of Interrogatories 8 and 9 was "no", then you should proceed to consider and answer Interrogatories 10 and 11 below.

10. What, if any, is the amount of monetary compensatory damages the plaintiff, JACK HARPER, has proved by a preponderance of the evidence that he has suffered as a proximate cause of the actions of the defendant, ARDEN MERCKLE?

_____

11. What, if any, is the amount of punitive damages that the plaintiff, JACK HARPER, has proved by a preponderance of the evidence that he is entitled to receive from the defendant, ARDEN MERCKLE?

_____

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No. 80-2022

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ARDEN MAYS MERCKLE,
Petitioner,

vs.

JACK R. HARPER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, JACK R. HARPER, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY CERTIORARI JURISDICTION TO REVIEW THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DETERMINATION THAT PETITIONER'S ACTIONS WERE NOT "JUDICIAL ACTIONS" FOR THE PURPOSES OF JUDICIAL IMMUNITY, UNDER THE STANDARD SET FORTH IN *STUMP v. SPARKMAN*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), WHERE PETITIONER, IN HOLDING RESPONDENT IN "CONTEMPT" FOR REFUSING TO BE SWORN, ACTED OUT OF PERSONAL MOTIVATION BY INJECTING HIMSELF INTO A PRIVATE CONVERSATION WHERE RESPONDENT HAD NOT APPROACHED THE PETITIONER IN HIS JUDICIAL CAPACITY OR OTHERWISE?

II.

ALTERNATIVELY, IS THE PETITIONER, A FLORIDA COUNTY JUDGE, ENTITLED TO JUDICIAL IMMUNITY FROM SUIT FOR HOLDING RESPONDENT IN CONTEMPT FOR REFUSING TO BE SWORN TO ANSWER QUESTIONS, OUTSIDE OF ANY JUDICIAL PROCEEDING, WHICH ACTION PETITIONER THOUGHT WOULD AID RESPONDENT'S EX-WIFE AND HER ATTORNEY IN A SUPPOSED ACTION TO ENFORCE SUPPORT PAYMENTS UNDER A PRIOR DISSOLUTION OF MARRIAGE DECREE WHERE SUBJECT MATTER JURISDICTION OF MARRIAGE DISSOLUTION DECREES AND ENFORCEMENT OF SUPPORT WAS VESTED EXCLUSIVELY IN THE CIRCUIT COURTS OF FLORIDA?

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BRIEF FOR RESPONDENT, JACK R. HARPER, IN OPPOSITION

STATUTES AND CONSTITUTIONAL PROVISIONS

This Brief in Opposition addresses the additional question of the Petitioner's subject matter jurisdiction for the purposes of judicial immunity, which issue was rendered moot because of the basis of the Fifth Circuit's Opinion below. *Harper v. Merckle*, 638 F.2d at 848, 858, n. 16 (5th Cir. 1981). Consideration of this alternative basis for denial of the Petition requires reference to the following provisions of the Florida Constitution and the Florida Statutes (1973), contained in the Appendix to this Brief: Article V, §§5(b) and 6(b), Constitution of the State of Florida; §26.012(2)(c), Florida Statutes (1973); §61.011, Florida Statutes (1973); §61.043, Florida Statutes (1973); §61.13, Florida Statutes (1973); §61.14, Florida Statutes (1973); §61.17, Florida Statutes (1973).

STATEMENT OF THE CASE

Course of Proceedings Below[1]

Respo lent Jack R. Harper's ("Harper") Complaint of August 8, 1975 (R. 1), alleged that Petitioner, Judge Arden Mays Merckle, ("Merckle") violated Harper's protected rights under Title 42, U.S.C. §1983, when, on August 16, 1974, he incarcerated Harper immediately following a "contempt" proceeding.

Merckle moved to dismiss the Complaint on grounds of judicial immunity (R. 3), which motion was denied. (R. 9). Merckle filed his answer and affirmative defenses (R. 11) and the case proceeded to trial following pre-trial order and stipulation. (R. 12, 15).

Following jury trial before the Honorable George C. Young, Chief Judge of the United States District Court, Middle District of Florida, a Verdict on Special Interrogatories (R. 33-A; PA. D) was returned in favor of Merckle, and Judgment was entered thereon. (R. 34). Harper's Motion for New Trial (R. 36) was denied (R. 39), and Harper appealed to the Fifth Circuit on May 22, 1979. (R. 41).

The Fifth Circuit reversed the Judgment and remanded the case for a new trial, holding *inter alia*, that Merckle was not entitled to absolute judicial immunity, that his actions were otherwise illegal, and that Harper was entitled to a new trial on Merckle's affirmative defense theory of a qualified immunity as a "conservator of the peace" because of error in submission of

---

1/ References are to the Record (R.) as paginated in the Court of Appeals. (PA.) = Appendices to Petition for Writ of Certiorari. (RA.) = Appendix to this Brief in Opposition. The trial transcript is in two volumes and is Record item 46, and will be referred to by volume and page number.

matters to the jury.[2] (PA. A). *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981). Merckle's Petition for Rehearing was denied on April 7, 1981. (PA. C).

Statement of the Facts

The Fifth Circuit's Opinion sets forth in detail the facts surrounding the Harper-Merckle confrontation, but omits additional facts and undisputed evidence (*Harper*, 638 F.2d at 852, n. 3) presented to the Circuit Court and relevant to this response.

Jack Harper came into the Hillsborough County Courthouse seeking his ex-wife, Patty, in order to pay her some $210.00 in child support entered in a dissolution of marriage proceeding which had occurred in Circuit Court in Polk County, Florida. Patty was secretary to the Honorable Harry Coe, Judge of the Circuit Court of Hillsborough County. Upon being unable to locate Patty, Harper went next door to the office of Judge Merckle who was a County Court Judge for Hillsborough County, Florida. He asked Barbara Bryant, Merckle's secretary, if she knew Patty and where she could be reached. Merckle was sitting in a chair in the outer office in street clothes and was not addressed by Harper. Merckle left and went into another office and reappeared a few minutes later. At that time, Harper was discussing the fact that he didn't know exactly how much he owed Patty and Merckle asked Bryant to go for the "Harper vs. Harper file," whereupon Merckle took a seat where Bryant had been sitting. (R. 46, I, p. 45).

Small talk ensued about college football and Bryant phoned to say she could not locate the "Harper vs. Harper

---

2/ The New Trial for the purpose of the adjudication of the qualified immunity issue is not here at issue.

file."[3] Merckle looked at the check and asked where Harper lived. Harper stated ". . in Apartment 5E of Boca Grande Beach Club." Harper had also produced a business card with the same box address as on the check. At that point, Merckle immediately attempted to put Harper under oath, ostensibly to learn his "address," and Harper told him he would not swear to anything and that he was leaving. (R. 46, I, pp. 46-47). Harper exited the back door of the Courthouse and tried to reach Tony Gonzalez, an attorney and former fraternity brother. Merckle sent Bailiffs after Harper who pursued and apprehended him. (R. 46, I, p. 48-49).

Harper was escorted by the Bailiffs back to Merckle's office where other people were standing around, and Merckle sent for a court reporter. (R. 46, I, p. 49). Thereafter, Merckle proceeded with what the Court of Appeals described as a "rump" hearing (*Harper*, 638 F.2d at 851, n. 2), set forth at pages 852-853 of the Fifth Circuit's Opinion. (Petition, pp. 5-10). At this "hearing" Merckle stated the reasons for his actions:

> The whole basis of this hearing is whether or not you are in contempt of this Court for not remaining where you were.
>
> The Court at this time does hold you in contempt so anything you care to say Mr. Harper, before the Court imposes any sentence on you?
>
> * * *
>
> MR. HARPER: Now why is all this happening?
>
> THE COURT: Because you disobeyed a court rule.
>
> MR. HARPER: Where was the Court?
>
> THE COURT: Just take him out, Mr. Pinegar.

3/ There was no such file in Hillsborough County. (R. 15; *infra*, pp. 5-6). *Harper*, 638 F.2d at 850-851.

MR. HARPER: Where is the Court? I want an attorney man.

(638 F.2d at 853).

Harper remained incarcerated for three days in squalid conditions, then was paraded into Court in handcuffs, whereupon he was sentenced to three days in jail with credit given for the time already spent. This "conviction" was ultimately reversed on appeal to the Florida Circuit Court.

As stated by the Fifth Circuit (638 F.2d at 855-856), Merckle did not press the issue of absolute judicial immunity at trial. In fact, in the controlling pretrial stipulation (R. 15) the parties agreed:

A. That defendant as a county judge of Hillsborough County, Florida, on August 16, 1974, did not have jurisdiction over cases involving dissolution of marriage and child support and custody of children. Defendant, therefore, did not have jurisdiction over the case of In Re: The Marriage of Jack Ridley Harper, Husband, and Patricia Folsom Harper, Wife, No. 70-4600, which was then pending in the Circuit Court of Polk County, Florida.

B. That on August 16, 1974, there was no case pending before defendant as a county judge of Hillsborough County, Florida, in which the plaintiff was involved as party, witness or otherwise.

C. That plaintiff's visit to the office of the defendant on August 16, 1974, did not have anything to do with a case then pending before the defendant as a county judge of Hillsborough County, Florida.

D. The last order entered by the Circuit Court of Polk County, Florida, in Case No. 70-4600, In Re: The Marriage of Jack Ridley Harper, Husband, and Patricia Folsom Harper, Wife, was entered on July 2,

> 1974, ...and is entitled, 'Order Directing Domestic Relations Department to Close File'. There were no petitions or other matters pending before the Circuit Court of Polk County, Florida, in said case on August 16, 1974.

The Trial Court held that Merkle acted in the complete absence of jurisdiction. Merckle went to the Jury under a *qualified immunity* defense as a "conservator of the peace" claiming that he had authority under §901.01, Florida Statutes (1973), and Article V, §19, of the Constitution of the State of Florida[4] to arrest for misdemeanors committed in his presence, and that Harper's profanity violated §§847.04 and 847.05, Florida Statutes (1973) (public profanity - a misdemeanor), and that he acted in "good faith," even if illegally. (R. 15). This theory was embodied in Special Interrogatories 8-9 (638 F.2d at 855, n. 6), which the Jury never reached because of the erroneous submission of the issue of the "legality" of his action to the Jury. 638 F.2d at 860-861.

The parties agreed that absolute immunity was an issue of law for the Trial Court. The Trial Court specifically instructed the Jury that *had* Harper used profane language *in connection with any case pending before Merckle*, as a matter of law such language would constitute contemptuous conduct, and that Merckle would have absolute judicial immunity. The Trial Court additionally instructed the Jury, based upon Merckle's limited defenses as an alleged "conservator of the peace":

> Because the particular divorce case was not pending before Judge Merckle and because as a matter of law he *did not have jurisdiction* of that case, the law does *not afford to Judge Merckle the absolute judicial immunity* to which I have just referred. (Emphasis added).

4/ *Harper*, 638 F.2d at 860, n. 19.

> However, he is entitled to what is called qualified immunity for acts committed by him as a conservator of the peace provided certain requisites are met, which I will explain to you as I go along. (R. 35, p. 21).

The Jury was then instructed that Merckle was a "conservator of the peace" under Florida law and that he would be entitled to a qualified immunity *only*

> ...for acts committed by him in the sphere of that position provided that he acted in good faith and had a reasonable belief that his act was lawful. So his defense to the contention that he violated the civil rights of Jack Harper by incarcerating him on August 16, 1974 is that he was acting in good faith and had a reasonable belief that the imprisonment imposed upon — imposed by him was lawful. (R. 35, pp. 21-22).

The Jury was specifically instructed that when a judge, acting as a police officer or conservator of the peace, is a witness to a misdemeanor committed in his presence he is a prosecuting witness, and may not act as a judge of the offense, and that a hearing on the charge of direct contempt is not a trial of a misdemeanor and that only a judge, not a police officer, had authority to try a contempt committed in his presence, in a judicial matter properly pending before him. (R. 35, p. 27).

Merckle, in the pretrial stipulation (R. 15), had also alleged that *as a conservator of the peace*, and based on "recent information obtained from attorney Russell Peavyhouse; [Patty's attorney] Patricia Harper...and Barbara Bryant..." he had "probable cause" to believe that Harper had violated §856.04, Florida Statutes (1973), which relates to felony desertion or willful withholding of support. This "theory" was likewise not pressed to the Jury, and they were not instructed on this specific claim. However, Merckle admitted that he had no judicial

jurisdiction over any such violation of law, and stated that *he only could have arrested Harper.* (R. 46, I, p. 179-180). Merckle opined that he had "probable cause" to have Harper *arrested* "...like an ordinary police officer..." for willful failure to pay child support, but *he did not arrest* Harper. (R. 46, I, pp. 216-217). Merckle admitted that he never told Harper he had committed any crime because he wasn't going to arrest him and he did not mention it that day. (R. 46, I, pp. 234-235). Merckle maintained that he was holding "court," acting in a "judicial capacity," although he admitted he had no jurisdiction over anything involving Harper. (R. 46, I, pp. 235-236).

Merckle stated that he believed that anyone who walks into his judicial chambers "involves themselves with me." (R. 46, I, p. 181). As noted by the Court of Appeals' Opinion (638 F.2d at 851, n. 1) the transcript of the "rump" hearing (638 F.2d at 852-853) contains no reference either to the alleged use of profanity by Harper, or to any of the other "reasons" advanced by Merckle at trial for his actions. (*Supra*, pp. 4-5).

Merckle testified that Harper refused to be placed under oath and displayed violent filthy language before him. (R. 46, I. p. 163). A month later Merckle gave the FBI a statement and could not remember any specific profanities. (R. 46, I, pp. 163-170). According to Merckle he didn't *need* to state them at that time. (R. 46, I, p. 170). Later, Merckle changed his testimony to state that Harper did *not* use profane language before he tried to swear him in, only afterwards. (R. 46, I, pp. 176-177).[5] At another time, Merckle stated he sent the deputies after Harper for his contemptuous conduct in *leaving his office.* (R. 46, I, p. 177).

5/ The trial court in submitting Interrogatories 1-3, did so only under admonition to the Jury that they were for the *Court's* "informational purposes" only, (for determining the case, if required, after verdict) and did not pertain to the issues they were to decide as embodied in Interrogatories 4-7. (R. 46, II, p. 369; R. 35, p. 15). 638 F.2d at 855.

When asked what kind of judicial procedure he was engaged in, Merkle replied:

> A. I was acting as a judicial officer conducting judicial business.
>
> Q. And what was your judicial business, trying to find his address?
>
> A. Mr. Harper came in to my Chambers, Mr. Luckie, my Chambers. (R. 46, I, p. 177).

As ultimate justification for his actions, Merckle testified that he heard of Harper prior to August 1974, and heard that he was continually behind in his support payments, and that there were "orders to show cause by a court who had jurisdiction." (R. 46, I, pp. 209-210). Merckle also stated that he heard that Harper had engaged in "some type of criminal activity." (R. 46, I, p. 211).[6] According to Merckle he gained this information in several conversations between attorney Peavyhouse and Patty, and based upon those conversations he *thought* a summons was outstanding and that Harper could not be located. (R. 46, I, pp. 151, 213-215). 638 F.2d at 850-851, n. 1.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit in *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981), presents no basis for the exercise of this Court's discretionary certiorari jurisdiction. The Fifth Circuit has scrupulously applied this Court's decision in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), in determining that Merckle was not clothed with absolute judicial immunity because his actions in attempting to "swear" Harper, and in placing Harper in contempt for resisting, were not "judicial actions" under the narrow facts of this case. The Fifth Circuit's Opinion

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6/ There was no evidence of any of this at trial.

alone evidences that *Stump* presents a clear and cogent guide to judges in determining the limits of their authority in exercising their *judicial* powers. Neither valid social-judicial policy nor the administration of justice require alteration of the *Stump* criteria for determining whether or not actions constitute "judicial acts."

Harper clearly had not sought Merckle in his judicial capacity or otherwise. Thus, under no circumstances can Merckle use his own actions or intentions to "bootstrap" himself into a position of absolute judicial immunity in the misuse of the "contempt" power. Merckle injected himself into a private social circumstance totally and completely unrelated to any judicial business before him, or which could come before him, and acted out of personal motivation using his judicial office "...as an offensive weapon to vindicate personal objectives...." 638 F.2d at 859.

Although the Court of Appeals' decision obviated the necessity of determining the question of Merckle's subject matter jurisdiction, under the stipulated facts of this case and the law of Florida, it is clear that Judge Merckle did not have "jurisdiction" over any matter which would allow him to cloak his actions with the mantle of absolute judicial immunity. As a County Judge in Florida, Merckle had no jurisdiction over dissolution of marriage or support matters which rest exclusively in the jurisdiction of the Circuit Courts.

ARGUMENT

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DOES NOT MISAPPLY THIS COURT'S DECISION IN *STUMP v. SPARKMAN*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). MERCKLE'S ACTIONS, AS AN INTERLOPER INTO A PRIVATE AFFAIR, WERE NOT "JUDICIAL ACTS." MOREOVER, HE ACTED TOTALLY WITHOUT SUBJECT MATTER JURISDICTION AS A FLORIDA COUNTY JUDGE ATTEMPTING TO ACT IN A SUPPORT-DISSOLUTION OF MARRIAGE ACTION IN WHICH JURISDICTION LAY EXCLUSIVELY IN THE FLORIDA CIRCUIT COURTS.

Merckle's Petition loses sight of the fact that this Court does not exist as a "super" appellate court, nor are the United States Courts of Appeals to be utilized as mere way stops on the road to the Supreme Court.[7]

This case presents absolutely no question of the "relationship" between a state court's valid contempt power and the doctrine of absolute judicial immunity which is necessary to be resolved by this Court, as opined in the Petition. Rather, Merckle simply seeks another appeal, in the hope that he can convince this Court to change its prior decision which has been correctly applied to his factual situation. The Fifth Circuit has not misinterpreted or misapplied this Court's decision in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). To the contrary, in this "...the rarest of factual settings..." (638 F.2d 848, 859), the Fifth Circuit has properly applied the factors relied upon by this Court in *Stump*, 435 U.S. at 360-362, 55 L.Ed.2d at 341-343 in citing, approvingly, the Fifth Circuit's own decision in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972).

7/ See e.g., *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672, 677 (1948); *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1923).

The Petition presents no valid policy or other reasons for the exercise of this Court's discretionary jurisdiction. The Fifth Circuit's Opinion in this case is not the first in which it has properly dealt with and applied the *Stump* criteria.[8] Both *Crowe* and the Opinion here amply demonstrate that there is no present need to revisit *Stump* or to change the factors this Court has enunciated for the determination of whether or not a judge's actions constitute "judicial acts." The Fifth Circuit's Opinion in this case amply demonstrates that the judiciary is well able to differentiate between "judicial" actions and non-judicial actions under the *Stump* factors. Merckle's actions, having been found by the Court to be wholly personal and not judicial, under facts which are not subject to dispute, (638 F.2d at 859) present no basis for changing the *Stump* criteria as requested in the Petition.

The paucity of existing cases involving the abuse of the contempt power outside of *Stump's* already broad test for absolute immunity for judicial acts amply demonstrates that judges are not in need of any further instruction from this Court in order to be able to "...predict with any degree of certainty what is and what is not a judicial act." (Petition, p. 12). The *vast* majority of jurists will not even find the need to make such a prediction. Merckle's suggestion that this Court should entertain his Petition and eliminate the "second prong" of the *Stump* decision, in order to allow judges to exercise the raw power of "contempt" under absolute judicial immunity in any situation, is unaccompanied by any rationale which would demonstrate that such a course of action is necessary to, and would advance, legitimate concerns of society and the judiciary with respect to the administration of justice.

A. Merckle's Actions Were Not Judicial Acts.

8/ See: *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).

Merckle's actions were not in furtherance of any judicial function. In attempting to "swear" Harper, and in holding him in contempt, Merckle injected himself into a purely private matter over which he stipulated that he had no "jurisdiction" as a County Court Judge in Hillsborough County. (R. 15; quoted, *supra*, p. 5). Harper did not come looking for any official or unofficial involvement with Merckle, but privately to pay his wife support money. This Court in *Stump* specifically referred to *McAlester*, with approval, and noted that a compelling factor supporting the immunity granted in *McAlester*, but *not* present here, was that

> '. . .the confrontation arose directly and immediately out of a visit to the judge in his official capacity. . . .'
>
> The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, *and to the expectations of the parties*, i.e., whether they dealt with the judge in his *official capacity*. (Emphasis added).
>
> [435 U.S. at 361-362; 55 L.Ed.2d at 342].[9]

Merckle's Petition recognizes the unambiguous criteria announced in *Stump*, and attempts to argue that the Fifth Circuit focused at the wrong "point in time" for determining Harper's "expectations" under the circumstances. (Petition, pp. 14-15). Merckle further "suggests" that the second criterion of the *Stump* factors should be eliminated. This suggestion arises from his realization that, in fact, Harper never sought any contact with Merckle, and that the Opinion sought to be reviewed is a correct application of law to fact.

Merckle's position that the Opinion focuses on the wrong moment in time is nothing more than an exercise in "boot-

9/ See also, *Crowe v. Lucas*, *supra*, n. 8.

strapping." In *McAlester*, the plaintiffs had gone to the courthouse where their son was awaiting trial to attempt to give him a fresh set of clothes. They entered the judge's office with the intent of learning when the trial was to start, thus, at least minimally, intentionally involving themselves with the judge in his judicial capacity. This element is wholly lacking in the present case. *Stump* requires that the courts look to Harper's expectation in dealing (or not) with Merckle, *not Merckle's intent in dealing with Harper*. It is specious to contend that Merckle's wrongful actions can change or affect Harper's expectation or intent in any manner, or at any time in this factual setting.

Here the seminal act was an officious attempt to swear Harper in hopes of getting his address for purposes of aiding Patty's lawyer in the service of a non-existant summons in a private domestic matter in which Merckle had no general or specific subject matter jurisdiction, and which in fact did not even exist at that point in time. (R. 15; *supra*, p. 6). 638 F.2d at 850-851, 854. In his Brief in the Fifth Circuit, (p. 10, n. 1) Merckle recognized that he had no authority to place Harper under oath.[10] By seeking to have this Court focus only upon the "contempt" hearing, Merckle admits the non-judicial character of his actions which led to his misuse of the raw power of "contempt." By injecting himself into a private affair totally beyond any possible official capacity he could have had as a County Judge, either specifically or generally, Merckle cannot "convert" non-judicial actions into judicial actions.

> The controversy that led to Harper's incarceration did not center around any matter 'then pending before the judge'; rather, it centered around the domestic problems of one of the Judge's friends, Harper's former

10/ The Jury, at their specific request during deliberations, was correctly instructed without objection, that "...there's no statute or legal right of Judge Merckle to require Jack Harper to be sworn to answer questions." (R. 35, p. 66).

> wife. These problems were brought to the Judge's attention in a social, not judicial, forum. Moreover, as the facts clearly establish, Harper did not visit Judge Merckle 'in his official capacity.' To the contrary, Harper sought only his former wife, whose office was adjacent to Judge Merckle's chambers, to settle his account with her.
>
> [638 F.2d at 859].

Merckle argues that because he was cursed by Harper, Merckle then had the power to place him in "contempt."[11] The Fifth Circuit rightfully rejected this feat of mental gymnastics. In cursing Merckle's attempt to swear him in the absence of any judicial or other authority, Harper in no sense was cursing a "judicial officer." Merckle himself admitted the limits of his supposed authority in his testimony to the Jury when he attempted to justify his actions as a "conservator of the peace," under his qualified immunity defense, by alleging that Harper had committed a "crime" by not paying the support money on time:

> Q. Well, that was a matter for some other judge than yourself to determine, wasn't it?
>
> A. That's right, but at that time, with that probable cause, I could have arrested him right then. I could not have tried him, no, sir, but another judge could have tried him to determine whether or not he was in fact then guilty of that felony.[12] (R. 46, I, pp. 179-180).

While the Fifth Circuit correctly found the use of contempt generally is a "normal judicial function" it also correctly found

---

11/ Harper denied cursing. See, n. 5 *supra;* 638 F.2d at 851, n. 2.

12/ An assertion which Merckle ultimately abandoned. As found by the Fifth Circuit his actions under his "conservator of the peace" theory were clearly illegal although the "legality" of his actions do not govern the issue of judicial immunity.

that absence of the second prerequisite of *Stump*, (the fourth prerequisite of *McAlester;* quoted, *Harper*, 638 F.2d at 858) would not allow Merckle to vault into a position of absolute judicial immunity. To accept Merckle's proposition would be to allow judges to exercise the naked contempt "power" whenever and however they choose, neither accompanied by *any* rational restraints nor even remotely connected with their judicial function. This is a circumstance not envisioned by the policies underlying judicial immunity, or the proper administration of justice. 638 F.2d at 856.

At page 14 of his Petition, Merckle states that County Court Judges have general contempt jurisdiction by operation of §38.22, Florida Statutes (1973). While this is true, the Florida statutory definition of contempt is ignored:

> A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the *business of said court*, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt. (Emphasis added).
>
> [§38.23, Florida Statutes (1973)].

Here, Merckle's action in attempting to swear Harper and subsequently holding him in contempt for refusing to be sworn were not "judicial acts" under *Stump* although, in a proper setting, they are and would be normal "judicial functions."

B. Merckle Lacked Subject Matter Jurisdiction.

The Fifth Circuit's determination that Merckle's actions were not "judicial acts" obviated the necessity of that Court's determining whether Merckle had subject matter jurisdiction although footnote 16 of the Court's Opinion, at page 858,

clearly suggests that if required to do so the Fifth Circuit would find a lack of jurisdiction. As stated in *Bradley v. Fisher*, 13 Wall. 335, 80 U.S. 646, 651 (1871) and reaffirmed in *Stump:*

> Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Although the Court here is involved with judicial immunity for the purposes of 42 U.S.C. §1983, it should be noted that the Supreme Court of Florida in *Farrish v. Smoot*, 58 So.2d 534, 538 (Fla. 1952), a successful false imprisonment action against a municipal judge, likewise recognized:

> 'A Judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his recognizance, or cases between persons who are not either actually or constructively, before him for the purpose.'

While it is recognized that the term "subject matter jurisdiction" must be given a broad interpretation, *Stump*, 435 U.S. at 357, 55 L.Ed.2d at 340; 638 F.2d at 858, n. 16, it cannot be stretched beyond logic to cover "contempt" powers exercised in the complete absence of judicial or judicially connected matters over which the judge is empowered to act. As asked by Harper at the "hearing," this case begs the question: *"[w]here was the Court"?* (*Supra*, p. 4).

Here the confrontation did not center around any case then pending before "Judge" Merckle, or any subject matter over

which he could have exercised any jurisdiction. The confrontation did not arise directly and immediately out of a visit to Merckle in his official capacity or *otherwise*. Merckle chose to interject himself into a private conversation concerning a personal matter having nothing to do with his judicial function, in an attempt to swear Harper to gain "evidence" with respect to a matter over which he not only stipulated he did not have jurisdiction (R. 15; *supra*, p. 6) but over which, as a matter of law, he could not have had jurisdiction. County Courts in the State of Florida have no jurisdiction over any matters relating to dissolution of marriage.[13]

If there ever was a clear case of lack of subject matter jurisdiction this is that case. Once again, Merckle cannot use his own act of attempting to swear Harper, for purposes of "aiding" his friend Patty Harper in a non-existent support action over which he did not and *could not* have had any subject matter jurisdiction, to bootstrap himself into "jurisdiction" over a rump "contempt" hearing inextricably flowing from that jurisdictionally void action. This is true whether one is concerned with jurisdiction and immunity under 42 U.S.C. §1983, or the valid exercise of contempt power as defined by §38.23, Florida Statutes (1973). (Quoted *supra*, p. 16).[14]

13/ Under Article V, §6(b), Florida Constitution (RA. 1) County Courts have jurisdiction as prescribed by general law. Under Article V, §5(b), Constitution of the State of Florida, the Circuit Courts have all original jurisdiction not vested in the County Courts. (RA. 1). Equity (Chancery) jurisdiction was (and still is) exclusively vested in the Circuit Courts under §26.012(2)(b), Florida Statutes (1973). (RA. 2). §61.011, Florida Statutes (1973) specifically provided that all matters involved in dissolution of marriage under Chapter 61, Florida Statutes "...are in chancery," (RA. 2). Thus, the Circuit Courts of Florida, and not the County Courts, are vested with all matters concerning dissolutions of marriage including the original action, support, enforcement, or modifications. §§61.043, .13, .14, and .17, Florida Statutes (1973). (RA. 2-6).

14/ The situation here is no different than the complete absence of jurisdiction inherent in a probate judge trying a criminal case. *Bradley v. Fisher*, *supra*, 80 U.S. at 651; *Harper*, 638 F.2d at 858, n. 16; *Crowe v. Lucas*, *supra*.

Harper respectfully submits that even the broadest construction of the concept of "subject matter jurisdiction" cannot and should not support the invocation of absolute judicial immunity in this case. The judiciary is not in need of a rule which would grant absolute judicial immunity under the unusual facts of this case.

CONCLUSION

The Petition for Writ of Certiorari presents no basis for the exercise of this Court's discretionary jurisdiction. The Fifth Circuit has scrupulously applied this Court's decision in *Stump*, in a factual situation which hopefully will never arise again. The Petition should be DENIED.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT,
JACK R. HARPER

NO. 80-2022

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ARDEN MAYS MERCKLE,

Petitioner,

vs.

JACK R. HARPER,

Respondent.

STATUTORY APPENDIX TO BRIEF FOR RESPONDENT, JACK R. HARPER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARTICLE V, §5(b), CONSTITUTION OF THE STATE OF FLORIDA

SECTION 5. Circuit courts.—

* * *

(b) JURISDICTION.—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

ARTICLE V, §6(b), CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE 6. County courts.—

* * *

(b) JURISDICTION.—The county courts shall exercise the jurisdiction prescribed by general law. Such jurisdiction shall be uniform throughout the state.

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§26.012, FLORIDA STATUTES (1973)

26.012 Jurisdiction of circuit court.—

* * *

(2) They shall have exclusive original jurisdiction:

* * *

(c) In all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 39 and 316;

* * *

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§61.011, FLORIDA STATUTES (1973)

61.011 Dissolution in chancery.—Proceedings under this chapter are in chancery.

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§61.043, FLORIDA STATUTES (1973)

61.043 Commencement of a proceeding for dissolution of marriage.—A proceeding for dissolution of marriage or a proceeding under §61.09 shall be commenced by filing in the circuit court a petition entitled "In re the marriage of_____, husband, and_____, wife." A copy of the petition together with a copy of a summons shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally.

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§61.13, FLORIDA STATUTES (1973)

61.13 Custody and support of children, etc., power of court in making orders.—

(1) In a proceeding for dissolution of marriage, the court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support as from the circumstances of the parties and the nature of the case is equitable. The court initially entering an order requiring one or both parents to make child support payments shall have continuing jurisdiction after the entry of such initial order to modify the amount of the child support payments, or the terms thereof, when such is found to be necessary by the court for the best interests of the child or children, or when such is found to be necessary by the court because there has been a substantial change in the circumstances of the parties. The court initially

entering a child support order shall also have continuing jurisdiction after the entry of such order to require the person or persons awarded custody of the child or children to make a report to the court on terms prescribed by the court as to the expenditure or other disposition of said child support payments.

(2) The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interests of the child. Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody.

(3) In any proceeding under this chapter, the court, at any stage of the proceeding and after final judgment, may make such orders about what security is to be given for the care, custody, and support of the minor children of the marriage as from the circumstances of the parties and the nature of the case is equitable.

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§61.14, FLORIDA STATUTES (1973)

61.14 Modification of alimony judgments; agreements, etc.—

(1) When the parties have entered into, or hereafter enter into, an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party has changed since the execution of such agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for a judgment decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the

changed circumstances and the financial ability of the parties, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order.

(2) When an order is modified pursuant to subsection (1), the party having an obligation to pay shall pay only the amount of support, maintenance, or alimony directed in the new order, and the agreement or earlier order is modified accordingly. No person shall commence, or cause to be commenced, as party or attorney or agent or otherwise, in behalf of either party in any court, an action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance, or alimony otherwise than pursuant to the order.

(3) This section is declaratory of existing public policy and of laws of this state which are hereby confirmed in accordance with the provisions hereof. It is the duty of the circuit court to construe liberally the provisions hereof to effect the purposes hereof.

(4) If a party applies for a reduction of alimony or child support and the circumstances justify the reduction, the court may make the reduction of alimony or child support regardless of whether or not the party applying for it has fully paid the accrued obligations to the other party at the time of the application or at the time of the order of modification.

---

§61.17, FLORIDA STATUTES (1973)

61.17 Alimony and child support; additional method for enforcing orders and judgments; costs, expenses.—

(1) An order or judgment for the payment of alimony or child support or either entered by any court of this state may be enforced by another chancery court in this state in the following manner:

(a) The person to whom such alimony or child support is

payable or for whose benefit it is payable may procure a certified copy of the order or judgment and file it with a complaint for enforcement in the circuit court for the county in which the person resides or in the county where the person charged with the payment of the alimony or child support resides or is found.

(b) If the pleadings seek a change in the amount of the alimony or child support money, the court has jurisdiction to adjudicate the application and change the order or judgment. In such event the clerk of the circuit court in which the order is entered changing the original order or judgment shall transmit a certified copy thereof to the court of original jurisdiction, and the new order shall be recorded and filed in the original action and become a part thereof. If the pleadings ask for a modification of the order or judgment, the court may determine that the action should be tried by the court entering the original order or judgment and shall then transfer the action to that court for determination as a part of the original action.

(2) The court in which such an action is brought has jurisdiction to award costs and expenses as are equitable, including the cost of certifying and recording the judgment entered in the action in the court of original jurisdiction and reasonable attorney's fees.